United States Court of Appeals

for the Second Circuit

APPENDIX

77-7142

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FILED
MAY 2 1977
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

ANTHONY HERBERT,

Plaintiff-Appellee,

—against—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants,

BARRY LANDO, MIKE WALLACE AND CBS INC.,

Defendant-Appellants.

B P/S

ON APPEAL, PURSUANT TO 28 U.S.C. § 1292(b), FROM AN INTERLOCUTORY ORDER OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

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PAGINATION AS IN ORIGINAL COPY

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

JUDGE NAGHT

JUDGE ~~FRANKEL~~ HAIGHT

1a

Jury demand date:
by pltff. 1-25-74

74 CIV. 434

Form No. 106 Rev.

TITLE OF CASE	ATTORNEYS
ANTHONY HERBERT VS. BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEMING, INC. ATLANTIC MONTHLY COMPANY.	For plaintiff: COHN, GLICKSTEIN, LURIE, OSTRIN & LUDELL 1370 Avenue of the Americas, N.Y.C. 10019 757-4000 For defendant: COUDERT BROTHERS Pan American Bldg.- 200 Park Ave-NYC 10017 (973-3300) (for defts. Mike Wallace and CBS) REMBAR WOLF & CURTIS 19 West 44th St- NYC 10036 (575-8500) (for deft. Atlantic Monthly Co.) ~~RICHARD G.~~ GREEN & Hillman 1270 Ave. of the Americas-NYC 10020 (246-8689) (for deft. Barry Lando)

STATISTICAL RECORD	COSTS			DATE	NAME OR RECEIPT NO.	REC.		DISB.	
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A. HERBERT BS. BARRY LANDO, ET-AL

2a

(PAGE #2)

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DATE	PROCEEDINGS
Jan25-74	Filed Complaint. Issued Summons.
Jan.25-74	Filed order that Edith Williams is appointed to serve the summons and complaint on the defts. Mike Wallace, Columbia Broadcasting System, Inc. and Atlantic Monthly Company and that Luther C. West is appointed to serve the summons and complaint on the deft. Barry Lando. Clerk
Jan. 25-74	Filed order that Gabriel Kantrovitz is appointed to serve summons and complaint on the deft. Atlantic Monthly Company. Clerk
Feb. 1-74	Filed affdvt. of service of Edity Williams of summons and complaint to deft. Atlantic Monthly Co.
Feb.1-74	Filed affdvt. of service of Edith Williams of summons and complaint to deft. Mike Wallace.
Feb.1-74	Filed affdvt. of service of Edity Williams of summons and complaint to deft. Columbia Broadcasting System, Inc.
Feb 4-74	Filed summons with return: SERVED: Affidavit of Luther C. West. dated Jan 31, 1974
Feb.15-74	Filed Order extending defts' time to answer to 3-15-74. FRANKEL, J. (m/n)
Feb.15-74	Filed defts. Columbia Broadcasting System, Inc. and Mike Wallace ex parte motion to enlarge time.
Feb19-74	Filed stip & order extending deft. Atlantic Monthly Co.'s time to answer to 3-15-74.
Feb. 19-74	Filed memo endorsed on motion filed 2-15-74. Motion granted. So ordered- FRANKEL, J. (m/n)
Feb19-74	Filed summons upon Barry Lando by Clerk of the U.S.D.C. that an answer to said complaint be served upon Cofin Glickstein Lurie Ostrin & Lubell with attached affidavit of service by Luther C. West dated 2-12-74.
Feb.25-74	Filed stip & order extending deft. Barry Lando's time to answer to 3-15-74. So ordered- FRANKEL, J.
March 18-74	Filed defts. Barry Lando, Mike Wallace and Columbia Broadcasting System Inc's affdvt. of Barry Lando and notice of motion for an order severing counts 1 and 11 of complaint. Ret. 3-25-74
March 18-74	Filed defts' Barry Lando, Mike Wallaceand Columbia Broadcasting System, Inc's memorandum of law in support of their motion to sever; and in the alternative to compel separate trials of Counts 1 and 11 of pltff's complaint.
March 18-74	Filed ANSWER of defts. Mike Wallace and Columbia Broadcasting System, Inc.
March 19-74	Filed ANSWER of deft. Atlantic Monthly Co.
March 18-74	Filed ANSWER of deft. Barry Lando
March 25-74	Filed deft. Atlantic Monthly Co's memorandum in opposition to motion by defts. Lando, Wallace and CBS insofar as it seeks a severance of counts 1 and 11 of the complaint and in support of their motion as it seeks, in the alternative, separate trials of counts 1 and 11.
April 2-74	Filed amended ANSWER of deft. Barry Lando
Apr. 4-74	Filed defts. Barry Lando, Mike Wallace and CBS, INC. memorandum of law in further support of their motion to sever; and in the alternative to compel separate trials of counts 1 and 11 of pltff's complaint.
Apr. 5-74	Filed pltff's memorandum in opposition to motion of defts. Lando, Wallace, CBS, INC. to sever or for separate trials.
Apr. 5-74	Filed deft. Atlantic Monthly Co's further memorandum in support of the motion for separate trials.
May 9-74	Filed memo endorsed on motion filed 3-18-74. Motion denied. So ordered- FRANKEL, DJ (m/n)
May 15-74	Filed pltff's first request for production of documents.
May 15-74	Filed pltff's notice to take deposition of deft. Barry Lando on 6-19-74
May 16-74	Filed pltff's notice of taking deposition of deft. Mike Wallace on 6-25-74
May 20-74	Filed pltffs Notice to take deposition and first request of pltff for production of documents.

(CONT'D — PAGE #3)

D. C. 110 Rev. Civil Docket Continuation

DATE	PROCEEDINGS	Date of Judgment
June 26-74	Filed deft. Atlantic Monthly Co's answer to first request for production of documents.	
June 26-74	Filed deft. Atlantic Monthly Co's first request for production of documents.	
July 5-74	Filed stip & order extending deft. Atlantic Monthly Co's time to respond to first request for production of documents to 6-21-74 and the time for all other defts. to respond to the first request for production of documents is extended to 7-11-74 and as indicated. So ordered- FRANKEL, J.	
July 12-74	Filed defts. Mike Wallace and Columbia Broadcasting System, Inc's answer to first request for production of documents.	
Aug. 1-75	Filed pltff's notice of taking deposition of the U.S. Dept. of Army, Office of Information, on 8-18-75	
Aug. 6-75	Filed affdvt. of service of subpoena duces tecum by an individual- served: J.S. Dept. of the Army, Office of Information by Col. Leo T. MaMahon, Jr. on 8-4-75	
1-8-76	Filed notice of change of firm name of defts atty, to Green & Hillman.	
2-23-76	Filed pltffs second request for production of documents.	
3-24-76	Filed pltffs answer to Atlantic Monthly Co's first request for production of documents.	
4-5-76	Filed defts (Lando's) answer to second request of pltff for production of documents.	
4-5-76	Filed deft (Lando's) answer to first request of pltff for production of documents.	
4-26-77	Mailed notice of reassignment to Judge Haight	
04-23-76	Filed Defts'. (Mike Wallace & CBS) first request for production of documents.	
05-12-76	Filed Deft's. (Barry Lando) first request for production of documents.	
05-13-76	Filed Deft's. (Barry Lando) notice of designation of Richard G. Green as trial counsel.	
05-17-76	Filed Defts'. (Mike Wallace & CBS, Inc.) notice of designation of Carleton D. Eldridge, Jr. as trial counsel.	
05-17-76	Filed Pltff's. notice of designation of Jonathan W. Lubell and Mary K. O'Melveny as trial counsel.	
05-18-76	Filed Deft's. (Atlantic Monthly Co.) notice of designation of Charles Rembar as trial counsel.	
05-24-76	Filed Defts'. (Mike Wallace & CBS) answers to questions by the court.	
05-24-76	Filed Deft's. (Lando) answers to questions by the court.	
05-25-76	Filed Pltff's. answers to questionnaire for initial pre-trial conference.	
05-26-76	PRE-TRIAL CONFERENCE HELD BY Haight,J. - Rule 37 motion to be made. Motion for summary judgment to be submitted & discovery to be completed by 1-1-77.	
06-02-76	Filed Pre-Trial Order that discovery shall be completed by 10-29-76 and that Defts'. summary judgment motions shall be submitted by 12-31-76.....Haight,J. (mailed notice)	
06-10-76	Filed Pltff's. response to Defts'. (Wallace & CBS) first request for production of documents.	
06-10-76	Filed Pltff's. response to Deft's. (Lando) first request for production of documents.	
07-21-76	Hearing begun and concluded July 21, 1976 on the matters of discovery. (before CEH)	
08-31-76	Filed transcript of record of proceedings dated 7-21-76.	
09-23-76	Filed Pltff's. affidavit in support of motion to compel discovery.	
09-23-76	Filed Deft's. (Atlantic) affidavit in opposition to Pltff's. request for additional discovery.	
09-23-76	Filed Deft's. (Atlantic) memorandum in opposition to Pltff's. requests for further discovery.	
09-23-76	Filed Defts'. (Lando, Wallace & CBS) memorandum of law in opposition to Pltff's. Rule 37 application.	
09-23-76	Filed Pltff's. memorandum of law in support of motion to compel discovery.	
10-29-76	Filed pltffs reply brief.	

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DATE	PROCEEDINGS	Dat Judg
10-29-76	Filed pltff affidavit in support of motion to compel discovery.	
10-29-76	Filed deft reply meo in opposition to motion.	
11-1-76	Filed Deft reply memo in opposition to pltffs request for further discovery.	
11-1-76	Filed defts affidavit in opposition to pltffs roquests for discovery.	
1-4-77	Filed Opinion # 45494 ..... Defts are ordered to comply with memo opinion of the J All documents demanded by pltff that are not covered by client-attorney privilege ar to be produced for in camera inspection of J. Haight. - So ordered Haight J. m/n	
1-5-77	Filed defts reply memo in opposition to pltffs request for further discocery.	
2-24-77	Filed memo opinion and order ... # 45629 .... I grant the requested certification and amend the order of 1-4-77 accordingly... so as to provide that in opinion of the Court such order involves a controlling question of law as to which there is substan groun for difference of opinion and that an immediate appeal from the order may mat advance the ultimate termination of the litigation So ordered Haight J, m/n	
3-25-77	Filed bond for undertaking of costs on appeal in amt. of $250.00 (Fireman's Fund)	
4-15- 77	Filed ntotice of transmission of record on appeal to USCA.	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ANTHONY HERBERT, Plaintiff,	:	Civil Action No.
-against-	:	
BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY, Defendants.	:	COMPLAINT
	:	PLAINTIFF DEMANDS A TRIAL BY JURY

----------x

Plaintiff, by COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, his attorneys, as and for his complaint against the defendants, alleges as follows:

JURISDICTION AND PARTIES

1. This Court has jurisdiction of the within action under the provisions of 28 U.S.C. 1333(a). The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

2. Plaintiff ANTHONY HERBERT (hereinafter "Herbert"), a citizen of the State of Georgia, is a retired United States Army Officer who, prior to his retirement, brought certain charges against his immediate superior officers relative to the cover-up of atrocities during the Vietnam War and

subsequent to his retirement caused to be written a book entitled "SOLDIER", which discussed his military career and the events surrounding his charges against said officers.

3. Defendant BARRY LANDO (hereinafter "Lando") is, upon information and belief, a citizen of the State of Maryland and at all times hereinafter mentioned is and was an employee of defendant COLUMBIA BROADCASTING SYSTEMS, INC. in which capacity he produced a program entitled "THE SELLING OF ANTHONY HERBERT" (hereinafter "Selling") which was broadcast on CBS Television Network from its studio in New York City on February 4, 1973 and who, subsequent thereto, wrote and caused to be published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine published by the defendant ATLANTIC MONTHLY COMPANY an article entitled "THE HERBERT AFFAIR" (hereinafter "Affair").

4. Defendant MIKE WALLACE is, upon information and belief, a citizen of the State of New York, and is and at all times hereinafter mentioned was a reporter employed by the defendant COLUMBIA BROADCASTING SYSTEMS, INC. in which capacity he serves as one of the correspondents of the documentary series known as "60 minutes" and who, as part of that series served as the narrator of and one of the interviewers on "Selling".

5. Upon information and belief, Defendant COLUMBIA BROADCASTING SYSTEM, INC. (hereinafter "CBS") is and at all times hereinafter mentioned was a corporation incorporated under the laws of the State of New York, having its principal place of business in the State of New York and engaging in the business of, among other things, the production, distribution, sale and broadcasting of television programs through one of its divisions, CBS Television Network.

6. Upon information and belief, defendant ATLANTIC MONTHLY COMPANY (hereinafter "Company") is and at all times hereinafter mentioned was a corporation incorporated in the Commonwealth of Massachusetts and engaging in, among other things, the publication, distribution andsale of a magazine known as "THE ATLANTIC MONTHLY" (hereinafter "Monthly") in the State of New York and elsewhere.

FIRST COUNT AGAINST DEFENDANTS
BARRY LANDO, MIKE WALLACE AND
COLUMBIA BROADCASTING SYSTEM, INC.

7. As a young man of 17, plaintiff enlisted in the United States Army. In the ensuing 24 years of military service he steadily rose in the ranks and was regarded with the highest professional esteem by his fellow soldiers and officers. Plaintiff was repeatedly cited by the Army as the most decorated soldier in the Korean War and in

November of 1951, General Matthew B. Ridgeway selected him as the outstanding American soldier in Korea. Plaintiff toured the United States and foreign countries representing the United States Army. Plaintiff's reputation for courage under fire and personal integrity was beyond dispute. In the view of the citizens of plaintiff's country he was a genuine American hero.

8. While Commander of the 2d Batallion, 503d Infantry, 173d Airborne Brigade in Vietnam, plaintiff reported to his superior officers atrocities committed and permitted by United States forces in violation of international law and military regulations. Plaintiff persisted in these reports, criticizing to his superior officers the acts of atrocities which were widely known in the Brigade. Notwithstanding recognition of plaintiff as an outstanding Batallion Commander, he was relieved of command by his superior Brigade officers. A poor efficiency rating was even placed against his record which was subsequently expunged by the Secretary of the Army upon review.

9. Immediately following his relief from command, plaintiff attempted to process charges in Vietnam against the Brigade officers - General John W. Barnes (hereafter "Barnes") and Colonel Joseph Ross Franklin (hereafter "Franklin") - for failing to act upon plaintiff's earlier reports and complaints and for covering up the charged atrocities.

10. Upon his return to the United States in 1969, plaintiff continued to pursue, first at Fort Leavenworth and then at Fort McPherson, his charges of war crimes committed in Vietnam during his tour there and the command coverup and complicity. In September of 1970, plaintiff's charges were made to the Third Army Inspector General at Fort McPherson and subsequently referred to the U.S. Army Criminal Investigation Division Agency (USACIDA) and in March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

11. In or about March of 1971, it became known beyond the military and Department of Defense that plaintiff was charging war crimes and command coverup thereof. Plaintiff's charges and his past difficulties in having the charges filed, investigated or acted upon immediately became a matter of wide public interest.

12. In or about June of 1971, defendant Lando first met plaintiff at Natural Bridge, Virginia. He brought with him an agreement to work on an "as told to" book about plaintiff's military experiences which he asked plaintiff to sign. Plaintiff refused to do so, stating that he believed it was against Army regulations. Lando continued to pursue the matter and approximately two weeks

later defendant Lando flew to plaintiff's home where he once again sought to have plaintiff sign such an agreement. Defendant attempted again in March, 1972, immediately following plaintiff's retirement, to have plaintiff sign the agreement. Plaintiff refused again.

13. Upon information and belief, commencing at a time which is presently unknown to plaintiff, defendant Lando undertook to create the false picture of plaintiff as a liar who never reported the war crimes he charged, as a perpetrator of atrocities and brutalities himself and as an opportunist who was trying to use an issue of current concern to explain his own alleged failures in the Army. Defendant Lando sought to promulgate this false view of plaintiff through the mass media including the 60 Minutes documentary show, of which he was a producer, and various magazine articles which he would write or cause to be written; notwithstanding the fact that defendant Lando knew that such a portrayal of plaintiff was false. Defendant Lando undertook the said course of conduct maliciously, with the intent to damage plaintiff and, in order to accomplish such objective, used the facilities and influence of the Department of Defense and the Department of the Army. Defendant Lando used and/or worked with other law-enforcement agencies and intelligence agencies

to construct the false and defamatory picture of plaintiff to be promulgated through the mass media.

14. Upon information and belief, defendant Wallace participated in the production and presentation and encouraged the publication of "Selling" when he knew that the publication and presentation thereof was false and distorted as herein alleged; that without any basis or investigation defendant Wallace had stated some time prior to "Selling" that plaintiff was a liar whose story should be discredited and defendant sought to carry out this predesign and purpose by his participation in the production of "Selling" while intentionally creating the false impression of a balanced and objective presentation.

15. Upon information and belief, at all times herein alleged and, in particular at the time of the production, presentation and broadcast of "Selling" defendants Lando and Wallace were employees of defendant CBS and their activities and conduct herein alleged were done within the scope of said employment; that said activities and conduct were known to and ratified by certain CBS officials and executive personnel.

16. The television program "Selling", produced by defendant Lando, was broadcast by defendant CBS on February 4, 1973 to millions of viewers; from beginning to end and as a whole it was written, edited and produced to

impugn plaintiff's reputation as a hero and an honest man disillusioned with the conduct of the government and the Army he had served with pride, and to falsely and maliciously paint him as a liar, an opportunist and the perpetrator of a hoax upon the public.

17. Under defendant Lando's supervision and direction, with the participation of defendants CBS and Wallace, "Selling" was written, edited and presented to the public under the false guise of "objective reporting" so as to more effectively damage plaintiff's reputation, undermine his charges and remove him as a highly respected critic of the conduct of the military establishment.

18. The transcript of "Selling" as published on national television is annexed hereto as Exhibit "A", made a part hereof and incorporated herein as though fully set forth herein. Defendants composed and caused to publish and did publish said false, malicious and defamatory transcript (Exhibit A) of and concerning plaintiff and by such composition and publication, as well as the presentation and broadcast thereof as herein alleged, defendants meant and intended to convey and did convey the following false and defamatory meanings of and concerning plaintiff:

(a) That plaintiff was not a hero but a

cold blooded killer and this was the view of his Commanders and those who served under him.

(b) That plaintiff's charges of atrocities, command complicity and cover-up had never been raised until the headlines were filled with news of the My Lai massacres and that plaintiff improperly sought to capitalize on such headlines.

(c) That plaintiff's charges of atrocities, command complicity and cover-up were made out of vindictive motives in response to his relief from command.

(d) That no proof existed to support the plaintiff's charge that he had reported an incident described as the "St. Valentine's Day Massacre" (hereafter "Massacre") to Franklin, his immediate superior, and that plaintiff had lied regarding that event.

(e) That "scores of people" were interviewed about plaintiff's charges, none of whom could support plaintiff, and that plaintiff was therefore a liar.

(f) That plaintiff himself had observed but failed to act on incidents of torture or other atrocities and thatplaintiff was therefore a liar.

(g) That "scores of people" were interviewed about plaintiff's book "SOLDIER", all of whom questioned its and plaintiff's veracity and accuracy and

that plaintiff had therefore lied in said book.

(h) That no pressure to discredit plaintiff was exerted upon members of the military interviewed for "Selling" and that their statements, therefore, showed plaintiff to be a liar.

(i) That investigations of plaintiff's commanding officers Barnes and Franklin were thoroughly conducted by the military and were not whitewashed in any fashion and that plaintiff's charges against these officers had been proven false.

(j) That no proof existed to support plaintiff's charges of atrocities, command complicity and cover-up, and that plaintiff therefore had lied on these matters.

(k) That plaintiff himself had participated in acts of brutality.

19. Upon information and belief, defendant Lando's research, interviews and investigation, and that of persons working with him or under his supervision disclosed specific support for and proof of plaintiff's charges of atrocities, command complicity and cover-up as described and discussed by plaintiff prior to the broadcasting of "Selling", and that such support and proof was known to defendants Wallace and CBS.

20. Upon information and belief, defendant Lando enlisted and received the aid, support and assistance of U.S. Army personnel to discredit plaintiff and undermine his story and impact upon the American public. With such assistance defendant Lando elicited equivocal statements from persons still in the Army regarding plaintiff by intimidating them and threatening their military careers. Such assistance and intimidation were known to and countenanced by defendants Wallace and CBS.

21. Upon information and belief, defendant Lando approached various persons to be interviewed with uncorrected galley proofs of isolated segments of plaintiff's book "SOLDIER" or read to them such alleged segments to elicit disagreement or concern with such segments, knowing such persons had not read plaintiff's book in its entirety. Statements and comments made by such persons in response to this technique were thereafter related and represented by defendants on "Selling" to be an indictment of plaintiff's book in its entirety, despite the fact that the full context had not been shown to them. Upon information and belief, had such persons been aware of the full passages or accurate contents of "SOLDIER", they would have made different statements or expressed different reactions.

Such conduct was known to and countenanced by defendants Wallace and CBS.

22. Upon information and belief, defendant Lando, taped or caused to be taped film interviews with witnesses and others which were not presented fully on "Selling" but were edited and taken out of the context of the interview so as to support defendants' malicious intentions to discredit plaintiff. Had such interviews been presented in full, or had segments thereof been presented in their proper context, plaintiff would not have been falsely and maliciously portrayed in the manner set forth in paragraph 18 above. Such editorial distortions were known to and countenanced by defendants Wallace and CBS.

23. Upon information and belief, defendant, Lando interviewed or caused to be interviewed witnesses who were favorable to and supportive of plaintiff's charges and declined and deliberately failed to include said interviews on "Selling" or to reveal their existence to the television audience. Such intentional omissions of positive information were known to and countenanced by defendants Wallace and CBS.

24. Upon information and belief, defendant Lando

conducted or caused to be conducted an interview with Captain Richard Heintz, plaintiff's military lawyer, which supported plaintiff's charges of atrocities, command complicity and cover-up and of the whitewashed investigation of plaintiff's charges against Barnes and Franklin. Defendant Lando failed to include portions of said interview on "Selling" and instead permitted a summary of the interview with Captain Heintz to be presented in a manner which did not reflect its true content, leaving the false impression that Captain Heintz was also uncertain about plaintiff's veracity. Such omissions and actions were known to and countenanced by defendants Wallace and CBS.

25. Upon information and belief, "Selling" was presented for approximately 30 minutes of air time and was edited, written and produced in such a manner as to appear to be a contemporaneous and/or continuous interview between plaintiff and defendant Wallace when in fact defendant Lando and defendant Wallace and others interviewed plaintiff in New York for approximately two hours and without the presence of any other persons who appeared on "Selling" except for one brief period lasting approximately 10 minutes with Major James Grimshaw. Defendant CBS was aware of such production, editing and conduct of defendants Lando and Wallace.

26. Upon information and belief, defendants conducted and/or caused to be conducted said interview with plaintiff under conditions which constituted a vast departure from those normally existing for other guests and subjects of "60 minutes" and of other interview, documentary or news programs of defendant CBS or its division CBS News, or of any other network. These unusual and abnormal conditions were intended by defendants and those acting with them to cause plaintiff to appear on "Selling" as evasive, harrassed, unresponsive to the interviewers' questions so as to damage his reputation and impugn his credibility with the American public. Some of these unusual conditions included the following:

(a) Plaintiff's interview was conducted and filmed in a small, stark room, painted entirely in white, without decoration, causing abnormal glare and giving plaintiff a haggard and uncomfortable demeanor.

(b) Excessive, high intensity lighting was placed in said room positioned so close to plaintiff's face and eyes as to cause him great discomfort, forcing plaintiff to squint and to be unable to look directly into the face of the interviewer. Such intense light caused plaintiff to appear evasive and not forthright and candid in manner.

(c) At least ten or twelve uninformed guards employed by defendant CBS were present in or around

said room, positioned at all times in a manner which created an atmosphere of intimidation, uncertainty and harrassment.

(d) Defendant Lando, along with defendant Wallace and others used abusive, abrasive and antagonistic language during the course of said interview in an attempt to goad plaintiff to anger. Such language ridiculed and harrassed plaintiff and persons attending said interview with him. Such unwarranted hostility and animosity was also expressed by hostile gestures, glances and facial expressions designed to further harrass plaintiff and create an aura of uncertainty and defensiveness.

(e) Defendant Lando, at the conclusion of said interview, threatened plaintiff that he intended to "get" him and persons who had worked and were working with him, further adding to the intended atmosphere of harrassment, intimidation and uncertainty.

(f) Officials and executive personnel employed by defendant CBS were present at said interview and made no attempt to stop such conduct by defendants Wallace and Lando but rather countenanced and encouraged same thereby causing plaintiff further distress and discomfiture.

27. Upon information and belief, said interview,

if viewed in its entirety rather than in the edited and distorted form in which it was published on "Selling" (as set forth in Exhibit "A"), would show the following facts which were at all times known to defendants:

(a) The aforesaid adverse, highly unusual circumstances surrounding said interview including the abrasive and harrassing behavior of defendants and others toward plaintiff.

(b) That plaintiff's responses to questions aired on "Selling" were not, in fact, the responses given by plaintiff to such questions but were instead taken out of context, with relevant portions deleted or foreshortened, and that the questions to which such answers related were not the same as those which appeared on "Selling".

(c) That had plaintiff's actual responses to the questions aired on "Selling" been shown, they would not have created the impression of vagueness and evasiveness which the alleged answers shown created.

28. Upon information and belief, defendants caused and intended "Selling" as published to include facial expressions, grimaces and vocal emphases designed to cast doubt upon plaintiff's reputation and allegations and instill in the mind of the television audience that plaintiff was not truthfully regarded. Such gestures,

tones of voice and related actions cannot be adequately determined from the written transcript of "Selling" annexed as Exhibit "A" and incorporated herein but were unique to the medium of visual presentation.

29. Upon information and belief, the taped, filmed or other interviews made or caused to be made by defendants Lando, CBS, Wallace and others for the production and presentation of "Selling" were conducted in comfortable settings, in direct contrast to the environment of plaintiff's interview as set forth in Paragraph 26 and, if seen or heard in their entirety, would show the following facts, directly in conflict with the false and malicious impressions created by "Selling" as set forth in Exhibit "A".

(a) That an interview of Major Grimshaw was conducted in the Pentagon, with Army personnel in attendance.

(b) That the interview with Kenneth Rosenblum would reveal that he was an investigator assigned to the Military District of Washington, the same command in which Barnes was a superior officer, and not merely a disinterested investigator from the Judge Advocate General's Corps.

(c) That the interview with Sergeant Bruce Potter was excerpted on "Selling" to portray plaintiff as

a war criminal when Sergeant Potter repeatedly stated that plaintiff did not and would not have condoned or committed war crimes.

(d) That the questions asked of Colonel John Douglas, Barnes and Franklin were specifically designed to elicit responses damaging to plaintiff and that it was made clear to Barnes and Franklin that the intention of "Selling" was to discredit plaintiff and thus to remove him as an effective critic of the military establishment.

(e) That defendants deliberately misrepresented plaintiff's remarks, writing, and statements to certain witnesses in order to goad them into anger at plaintiff so as to elicit the desired distorted responses to questions which cast plaintiff as a liar, an opportunist and a vindictive man.

(f) That defendants deliberately attempted to create the impression in the minds of persons being interviewed that plaintiff had made a fortune from the writing of his book, intending to breed suspicion and contempt for plaintiff so as to elicit distorted responses.

(g) That numerous persons interviewed supported plaintiff's charges, as well as his veracity and leadership, and specifically denied any suggestion

that plaintiff was brutal or as a ruthless "killer".

(h) That numerous persons interviewed who were still in the military declined to respond favorably to plaintiff or at all because of fear of reprisals or other adverse influence upon their careers and that in some cases defendants, with the participation and assistance of the U.S. Army, used such fears to exploit and affect their responses.

(i) That the summary of the interviews of Mike Plantz and Bob Stemmies presented on "Selling" were distorted and out of context.

(j) That the interviews of Captain Bill Hill would reveal that Hill supported plaintiff's version of reporting the "Massacre" to Franklin and of other charges made by plaintiff, that Hill was fearful of military repercussions for any favorable statements made about plaintiff, that Hill believed that Army regulations prevented him from detailing his knowledge of incidents reported and described by plaintiff, and further that the quote attributed to him on "Selling" was out of context and elicited by deceitful means by misrepresenting to Hill statements made by plaintiff which had not been made.

30. Upon information and belief, defendants

Lando, Wallace and CBS selected the title to "Selling" so as not only to impugn the honesty and motives of plaintiff but also to placate the Pentagon after having previously received adverse and hostile reactions from the U.S. Military establishment to a documentary program entitled "The Selling of the Pentagon" which criticized said establishment.

31. The conduct of defendants Lando, Wallace and CBS, at all times herein, as set forth above, deliberately and maliciously defamed plaintiff, was accomplished by means which radically departed from usual and normal professional media and journalistic standards, and resulted in the national broadcast of "Selling" which created and presented false and distorted information and impressions known to defendants to be false and distorted but presented with reckless disregard of whether or not they were false and distorted.

32. The malicious activities of defendants with regard to the intentions and effect of "Selling" have continued to date, in that defendant CBS has attempted to forestall the instant litigation by directing its wholly-owned subsidiary Holt, Rinehart & Winston, publisher of

"SOLDIER" not to make an early payment against plaintiff's earned royalties under his contract according to the standard usual custom and practice in the publishing trade, which would have been made but for the intervention of defendant CBS.

33. By reason of the aforesaid acts of defendants Lando, Wallace and CBS, the broadcast of "Selling" caused plaintiff to suffer the following special damages: (a) The appearance of "Selling" almost simultaneously with the publication of "SOLDIER" impaired said book as a literary property and caused sales to be below expectations; (b) the sale of the paperback rights of "SOLDIER" was for a sum substantially less than would have been received had "Selling" not been broadcast; (c) offers and discussions regarding sale of motion picture rights to "SOLDIER" which took place prior to the broadcast of "Selling" were discontinued after its broadcast and no movie rights have been sold; (d) offers and discussions regarding the sale of rights to a filmed lecture series to television, industry and educational institutions which took place prior to the broadcast of "Selling" were discontinued after its broadcast and such rights have not been sold; (e) plaintiff's paid speaking engagements and public appearances dropped sharply immediately after the broadcast of "Selling" and have

continued to be far less than prior to such broadcast, all to his special damage in the sum of Two Million Five Hundred Thousand ($2,500,000.00) Dollars.

34. By reason of the aforesaid acts of defendants, plaintiff has been greviously injured in his good name, character and reputation; plaintiff's reputation among the American public in general as a courageous and honest person dedicated to the welfare of his country has been seriously impaired; plaintiff's reputation, both to the general public and to his friends, acquaintances and former colleagues in the armed forces, as a professional soldier of high moral character has been destroyed; plaintiff's good name and character acquired over many years of dedicated service to his country has been deeply damaged, and plaintiff and his family have been held up to ridicule and contempt by friends, acquaintances, neighbors and the public in general, all to his general damage in the sum of Ten Million ($10,000,000.00) Dollars.

SECOND COUNT AGAINST DEFENDANTS
BARRY LANDO AND ATLANTIC MONTHLY
COMPANY

35. Plaintiff repeats and realleges each and every allegation contained in paragraphs of this Complaint numbered "1" through "3" inclusive, "6" through "13" inclusive and "16" through "31" inclusive, as though herein

fully set forth at length.

36. The magazine "Monthly" published by defendant Company is sold throughout the country and, upon information and belief, has a circulation in excess of 375,000 copies.

37. The magazine article "Affair", written by defendant Lando, was distributed by defendant Company in the May, 1973 issue of "Monthly", Volume 231, Number 5; "Affair" was written and published to impugn plaintiff's reputation as a hero and an honest man disillusioned with the conduct of the government and the Army had had served with pride, and to falsely and maliciously paint him as a liar, an opportunist and the perpetrator of a hoax upon the public.

38. By reason of defendant's malicious intentions, the magazine article "Affair" repeated, continued and republished the false and defamatory information broadcast on "Selling" and, upon information and belief, defendant wrote said "Article" intending to accomplish such a result.

39. "Affair" was written by defendant Lando and published by defendant Company under the false guise of "objective reporting" so as to effectively damage and

continue the damage to plaintiff's reputation, undermine his charges and remove him as a highly respected critic of the conduct of the military establishment.

40. A copy of "Affair" as published in "Monthly" is annexed hereto as Exhibit "B", made a part hereof and incorporated herein as though fully set forth herein. Said "Affair" which defendant Lando composed and defendants caused to be published and did publish is false, malicious and defamatory of and concerning the plaintiff; by such writing and publication as a whole and by the specific passages alleged herein defendants meant and intended to convey and did convey the false and defamatory meanings of and concerning plaintiff alleged herein.

41. "Affair" conveyed the false, defamatory and malicious impression that plaintiff was a brutal and vicious man who had himself committed acts of atrocities and war crimes, by reason of the following specific passages therein, as well as in its entirety:

(a) "Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts."

Upon information and belief, defendant Lando maliciously omits the fact, known to him when "Affair" was written and published, that the Secretary of the Army formally exonerated plaintiff from all such charges; that every company officer in plaintiff's Batallion had sworn under oath that body counts reported by plaintiff were accurate; and that the interviews mentioned were arranged by officials of the Army with persons known to be unfavorable to plaintiff or fearful of reprisals by the Army for making favorable statements about plaintiff.

(b) "Many other officers, who might have effectively challenged several of Herbert's charges, kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him."

The impression that plaiptiff was a man to be feared, thereby causing persons interviewed to be afraid to tell the truth, is false.

(c) "It was only after Herbert had been transferred to Fort McPherson, Georgia, where the ~~My Lai trials~~ were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes".

The suggestion that plaintiff had committed war

crimes himself and wanted to cover up his own conduct is false and defamatory.

(d) "Master Sergeant Roy Baumgarner, who served under Herbert, was charged with having murdered three Vietnamese peasants in cold blood, blown off their heads with a grenade, then produced several Chinese weapons which he claimed he found on their bodies to substantiate his story that they were enemy soldiers. Herbert ridicules the charges, and depicts himself defending a hapless Baumgarner's constitutional rights against badgering military investigators.

Herbert ends his account without mentioning that Baumgarner was ultimately court-martialed and found guilty on the basis of overwhelming evidence."

Upon information and belief, defendant Lando knew that Army records reveal that plaintiff himself brought these very charges against Baumgarner and appeared at the court martial (when Franklin and Barnes failed to do so), and defendant Lando further knew that the sentence was changed and reduced by the Army to a nominal fine and Baumgarner returned to Vietnam. Thus the impression that plaintiff condoned war crimes and brutality is false and defamatory.

42. "Affair" conveyed the false and malicious impression that plaintiff had not reported atrocities, including the "Massacre", to his superior officers and that

no proof for his charges of such atrocities, command complicity and cover-up existed, and that plaintiff was, therefore, a liar, by reason of the following specific passages thereof, as well as in its entirety:

(a) "When the Pentagon told Mort Kondracke, the Washington reporter for the Chicago Sun-Times, that Franklin had passed a lie detector test denying Herbert had ever reported war crimes to him, Kondracke wrote a lengthy article on the Army's claim. But the New York Times, which had given considerable space to earlier news that Herbert had passed a lie detector test, made no mention of the Army's report concerning Franklin."

Upon information and belief, while defendant Lando was aware that the alleged lie detector test taken by Franklin has never been released to the public (nor have its contents, format or testing methods been disclosed) and that the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; the above-quoted statement was written and published to create the false impression that the test had indeed been given and passed as alleged by the Army and that its admission, contents, methods, format and results were comparable to plaintiff's and entitled to the same credibility.

(b) By following the passage set forth

in (a) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and Franklin wherein Franklin denied plaintiff's charges, defendant Lando maliciously sought to further emphasize Franklin's false statements that he had never discussed war crimes with plaintiff. Defendant Lando republished said segment notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as hereinabove alleged.

(c) "In Soldier Herbert claims there are several people who had seen Franklin in Vietnam on February 14. We asked Herbert for names. Not one of those people, in the Army or out, on the record or off, could back up Herbert's claim."

Upon information and belief, defendant Lando interviewed persons who did support plaintiff's statement that Franklin was present in Vietnam as plaintiff has said, but Lando falsely stated he had not talked to such persons so as to portray plaintiff as a liar.

(d) "Hill denied telling Herbert he was certain he had seen Franklin returning to Vietnam on February 14. He said he had heard Herbert talking about the killings on the battalion radio that day, but did not know who he was talking to. Nor could he be sure that Herbert had in fact reported those killings to brigade."

Defendant Lando knew that Hill had supported

plaintiff in an interview with defendant made in 1972 and had stated that plaintiff spoke over the radio that day over the brigade net, a communication link which went directly only to brigade headquarters. Upon information and belief, defendant Lando misrepresented and distorted said interview in "Affair" as quoted above to carry out his malicious intentions to make plaintiff appear to be a liar.

(e) "We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14."

Upon information and belief, defendant Lando knew that Cam Ranh Bay was beyond the landing area for 173rd Brigade helicopters and that there were no helicopter flights between Cam Ranh Bay and the Brigade headquarters, and that defendant Lando failed to reveal the existence of persons known to him and/or interviewed by him who supported plaintiff's version of the statements that Franklin returned to headquarters in Vietnam on or before February 14.

(f) Upon information and belief, defendant Lando maliciously failed to reveal during his discussion of the dates that Franklin claimed to be in Hawaii on R & R (Exhibit B, pages 5-6), that the hotel receipt demonstrates a significant reduction in room charges on and

after February 13, 1969, thereby supporting plaintiff's statements that Franklin had returned to Vietnam on or before February 14.

(g) By following the discussion set forth in (f) above with the republication of a segment of "Selling" depicting portions of an interview between plaintiff and defendant Wallace, defendant Lando maliciously sought to further emphasize his false and misleading statements regarding Franklin's presence in Hawaii. Said segment was republished notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as herein alleged and notwithstanding the oppressive, unusual and hostile circumstances under which plaintiff's interview was conducted, as herein alleged.

43. "Affair" conveyed the false and malicious impression that plaintiff was a liar and that his statements and his book "Soldier" were false and untruthful by reason of the following specific passages thereof, as well as in its entirety:

(a) "Most of Soldier is a melange, a kaleidoscope of truth, half-truth, and fabrication."

Upon information and belief, defendant Lando knew that such statement was false, that "Soldier" was a

truthful account and that interviews conducted by defendant did not support this false and defamatory charge.

(b) "A few weeks later, after Hill had had a chance to read Soldier, I spoke with him again. 'Herbert is the best batalion commander I ever had', he said. 'But for some reason he's become a liar, it's all so much garbage."

Upon information and belief, defendant Lando elicited the alleged statement from Hill by reading to him certain portions of the uncorrected galley proofs of "Soldier" and/or misrepresenting their contents to suggest plaintiff had attacked Hill, in order to goad him to anger at plaintiff; defendant Lando knew that Hill had not read "Soldier" and further that the passages involved were taken out of context or otherwise distorted to cause Hill to doubt plaintiff's integrity and motives; defendant Lando knew that Hill would have reacted differently to "Soldier" had he read the final version; defendant Lando also knew that Hill agreed with the contents of "Soldier", of which he had personal knowledge, as it was finally published.

(c) By following the passage set forth in (b) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and plaintiff discussing Hill, defendant Lando maliciously sought to further emphasize the false impression of Hill's

remarks concerning plaintiff, that Hill neither believed nor supported plaintiff as herein alleged in paragraph "29(j)". Defendant Lando republished such segment notwithstanding the malicious and false manner in which "Selling" was written, edited, produced and broadcast as herein alleged.

(d) "After talking with scores of men who had known Herbert in Vietnam, many of whom still admire him, we could not find a single person who believed that Herbert had been relieved for trying to get war crimes investigated. Most gave other reasons, from personality conflict between Franklin and Herbert, to Barne's claims that Herbert could not be trusted, could not get along with the brigade staff, or might be using too much firepower against civilian-populated areas."

Upon information and belief, defendant Lando interviewed many persons who believed that plaintiff was relieved from command as a reaction to plaintiff's efforts to have war crimes investigated and supported plaintiff's statements in this regard and falsely stated that not a single person could support plaintiff.

(e) "Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittore denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. He had no sons."

Defendant Lando falsely stated that Bittorie had no sons; upon information and belief, defendant Lando further misrepresented and distorted Bittorie's statements concerning plaintiff's charges so as to make it appear that he could not substantiate plaintiff's story; defendant Lando further failed to disclose that Bittorie had not wished to speak with Lando, that he was pressured into doing so by Army personnel acting in concert with defendant Lando.

(f) "Over the next few weeks, Sixty Minutes researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in Soldier. One after another refuted many of Herbert's claims".

Upon information and belief, defendant Lando's statement that they talked to 120 persons who refuted plaintiff's claims is false; defendant Lando interviewed or was aware of the existence of many persons mentioned in Soldier and/or who had served with plaintiff who backed plaintiff totally; defendant Lando was further aware of the results of investigations made by other reporters in which these persons fully supported plaintiff; defendant Lando intended by this passage to create the false and defamatory impression that plaintiff had lied.

(g) "...proving Herbert was telling the truth... turned out to be

difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations."

Upon information and belief, defendant Lando inserted this false and malicious statement in "Affair" to further cast plaintiff as a liar whose statements could not be supported or substantiated, notwithstanding defendant's personal knowledge of many persons who did support plaintiff as herein alleged.

44. "Affair" conveyed the false and malicious impression that plaintiff had never complained of the failure of the Brigade Officers Barnes and Franklin to pursue the atrocity and war crime charges until after My Lai became a matter of great public concern and that plaintiff, for his own opportunist personal ends, took advantage of such concern, by reason of the following specific passages thereof, as well as in its entirety:

(a) "There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim."

Upon information and belief, defendant Lando falsely and maliciously made the above-quoted statement when he knew that plaintiff was working on his war crime charges and command cover-up during the said period between April 5, 1969 and September 28, 1970, and defendant specifically referred therein to "no written evidence" to falsely infer defendant did not know of plaintiff's activities regarding the charges during the said period and to imply that there was no other evidence.

(b) "According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent $8000 of his own money, getting statements, contacting witnesses, all to buttress his war crime case.
"Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.
"It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes."

Upon information and belief, defendant Lando falsely and maliciously made the above-quoted statement when he knew that plaintiff, while at Fort Leavenworth, Kansas, was working on his charges of war crimes and command cover-up.

(c) "Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind."

Upon information and belief, defendant Lando falsely and maliciously created the impression that plaintiff could have included his charges of atrocities, command complicity and cover-up in the named inquiry, thereby causing plaintiff to appear to have lied about his efforts to have his charges investigated, when defendant knew Army regulations prohibited such inclusion, had seen such regulations and falsely stated their contents.

(d) By following the passage set forth in (a) above with the republication of a segment of "Selling" depicting portions of an interview between defendant Wallace and Colonel John Douglas, defendant Lando attempted to strengthen his false statement that plaintiff had made no effort to have his charges investigated. Defendant Lando knew such statement was false as herein alleged and republished said segment notwithstanding the malicious and false manner in which "Selling" was edited, written, produced and broadcast as hereinabove alleged.

(e) "The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by

> Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation'. Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction."

Upon information and belief, defendant Lando created the impression that the Army "fact sheet" was entitled to special credibility rather than a partisan document biased against plaintiff, and further falsely stated that plaintiff had made 21 allegations of which only seven were substantiated, thereby making plaintiff appear to have lied about or falsely exaggerated his charges when defendant Lando knew that plaintiff made 8 charges, 7 of which were substantiated and the eighth not pursued because the individuals involved were dead.

45. "Affair" conveyed the false and malicious impression that plaintiff was a revengeful man who was only concerned with his own personal career and for those purposes improperly exploited the nation's concern over war crimes and that plaintiff was not what he pretended to be, by reason of the following specific passages thereof, as well as in its entirety.

> "What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.
>
> * * * * *
>
> "The press, which long had been

> negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we brought ourselves a martyr with feet of clay."

Upon information and belief, and for the reasons herein alleged, the said statements were maliciously made by defendant Lando to deliberately create a false and defamatory impression of plaintiff.

46. "Affair" conveyed further false and malicious impressions regarding plaintiff, including the following:

(a) That plaintiff had written "Soldier" for the possible money he might receive by falsely stating: "Herbert had shared advance payments of more than $100,000 with Jim Wooten and their agents for the book." Upon information and belief there was no reason to publish this false statement except defendant Lando's malicious intention to impugn plaintiff's concern regarding war crimes, the cover-up of the crimes and the operations of United States military forces.

(b) That plaintiff was a self-centered egotist by falsely stating that when defendant Lando met plaintiff he "had a chestful of decorations" and, upon information and belief, that defendant Lando knew that plaintiff did not and had not worn any decorations since his return from Vietnam in 1969 and that such false statement was maliciously made to impugn plaintiff's reputation as herein alleged.

(c) That plaintiff sought to gain publicity by exploiting a false issue by reason of falsely stating that "it was only by claiming to be a martyr that Herbert had gained the national [illegible]."

(d) That false statements implying plaintiff was a paranoid individual were inserted by defendant in an attempt to diminish his own malicious objectives and conduct; as shown in the following statement:

> "As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. ...
>
> "Herbert kept pressing the point, intimating that all along I had been engaged not in journalism but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of Sixty Minutes) and to defile his true story.

Upon information and belief, defendant Lando falsely stated, as herein alleged, that his alleged "doubts" about plaintiff were unrelated to plaintiff's refusal to collaborate, and defendant further falsely distorted his remarks to plaintiff as herein alleged and plaintiff's reactions thereto to create the impression that plaintiff was unstable, and defendant further made this false statement without revealing the oppressive and unusual circumstances surrounding said interview as hereinabove alleged in Paragraph "26".

47. Defendant Company adopted, confirmed and ratified the aforesaid false and defamatory statements contained in "Affair" as well as the article in its entirety and defendant published such adoption, confirmation and ratification as an introduction to said "Affair" in the words set forth on page one of Exhibit B, herein annexed and incorporated.

48. Upon information and belief, at the time of said publication alleged in paragraph "37", defendant Company knew that said "Affair" was false and was intended to destroy plaintiff's reputation and to portray plaintiff as a liar and a brutal and vindictive man.

49. Upon information and belief, at the time of said publication alleged in paragraph "37", defendant Company knew the matters contained in "Affair" as well as "Affair" as a whole to be directly in conflict with the views and knowledge of people other than defendant Lando, and with reckless disregard as to the truth or falsity of said matters and as to the harm done to plaintiff, defendant company published "Affair" as a true portrayal of plaintiff and his conduct.

50. Upon information and belief, after the publication of "Affair" by Defendant Company as herein alleged, the false and malicious nature of "Affair" and its defamatory effect upon plaintiff were again brought to the attention of defendant Company. Representatives of plaintiff and persons

with knowledge of the false and malicious manner in which "Affair" was written and published requested a retraction or other response by defendant Company on behalf of the truthful facts concerning plaintiff but defendant Company declined to do so and further ratified and affirmed the malicious content and intent of "Affair."

51. The conduct of defendants Lando and Company at all times herein, as set forth above, deliberately and maliciously defamed plaintiff, was accomplished by means which radically departed from usual and normal professional standards of journalism, and resulted in the national publication, circulation and distribution of "Affair" which created and presented false and distorted information and impressions known to defendants to be false and distorted but published with reckless disregard of whether or not they were false and distorted.

52. By reason of the aforesaid acts of defendants Lando and Company, the publication and circulation of "Affair" caused plaintiff to suffer the following special damages: (a) the publication, distribution and circulation of "Affair" further impaired the value of "SOLDIER" as a literary property and caused sales to be below expectations; (b) offers and discussions regarding sale of motion picture rights to "SOLDIER" which took place prior to the publication of "Affair" were discontinued after its publication and no movie rights have

been sold; (c) offers and discussions regarding the sale of rights to a filmed lecture series to television, industry and educational institutions which took place prior to the publication of "Affair" were discontinued after its publication and such rights have not been sold; (e) plaintiff's paid speaking engagements and public appearances dropped sharply immediately after the publication of "Affair" and have continued to be far less than prior to such broadcast, all to his special damage in the sum of Two Million Two Hundred Twenty Five Thousand ($2,225,000.00) Dollars.

53. By reason of the aforesaid acts of defendants, plaintiff has been greviously injured in his good name, character and reputation; plaintiff's reputation among the American public in general as a courageous and honest person dedicated to the welfare of his country has been seriously impaired; plaintiff's reputation, both to the general public and to his friends, acquaintances and former colleagues in the armed forces, as a professional soldier of high moral character has been destroyed; plaintiff's good name and character acquired over many years of dedicated service to his country has been deeply damaged, and plaintiff and his family have been held up to ridicule and contempt by friends, acquaintances, neighbors and the public in general, all to his general damage in the sum of Ten Million ($10,000,000.00) Dollars.

WHEREFORE, plaintiff demands judgment:

(1) against defendants Lando, Wallace and CBS, on the first count in the amount of Twelve Million Five Hundred Thousand ($12,500,000.00) Dollars as compensatory damages and Ten Million ($10,000,000.00) Dollars as exemplary damages, with interest thereon, together with the costs and disbursements, including fair and reasonable allowances for counsel fees and other lawful expenses;

(2) against defendants Lando and Company on the second count in the amount of Twelve Million Two Hundred Twenty Five Thousand ($12,225,000.00) Dollars as compensatory damages and Ten Million ($10,000,000.00) Dollars as exemplary damages, with interest thereon, together with the costs and disbursements, including fair and reasonable allowances for counsel fees and other lawful expenses.

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL
Attorneys for Plaintiff

By: _____
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TRANSCRIPT

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60 MINUTES

Volume V, Number 9

as broadcast over the

CBS TELEVISION NETWORK

Sunday, February 4, 1973

6:00 - 7:00 PM, EST

With CBS News Correspondents Morley Safer and Mike Wallace

PRODUCED BY CBS NEWS

EXECUTIVE PRODUCER: Don Hewitt

DICK CAVETT: Will you welcome, please, Lieutenant Colonel Anthony Herbert. [Applause]

MIKE WALLACE: As millions of viewers watched, Lieutenant Colonel Herbert described one of the war crimes he said that he had witnessed in Vietnam.

HERBERT: He had a woman by the hair with her head bent back . . . and he had his right arm around her throat with the knife dug in right here. And there was a child holding her leg, screaming, and he had another-- the second child buried face-down in the sand with his foot on his head, suffocating him.

WALLACE: And you say it was your insistence on having war crimes investigated that led to your relief from command, right?

HERBERT: I still say it.

WALLACE: Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?

COLONEL ROSS FRANKLIN: No.

WALLACE: Never?

FRANKLIN: Never.

. . . . . .

MORLEY SAFER: After a week or two weeks of prodding and pushing, of relentless competition, of harassment and baiting, of the kind of abuse that would get any self-respecting Englishman up in arms if it were animals treated thus, the vacation is almost over.

. . . . . .

I'm Morley Safer.

WALLACE: I'm Mike Wallace. Those stories and more, tonight on 60 MINUTES. First, these headline items.

The first American POWs will begin to return from Hanoi by midweek. This, according to a Canadian member of the International Control Commission in Saigon.

Also in Saigon today, North Vietnamese and Viet Cong officials had their first public outing, passing out cigarettes to journalists, answering the questions of passers-by and generally trying to be friendly.

But in Belfast, Northern Ireland, the past 24 hours have been the bloodiest of the year: 10 persons dead, 20 wounded.

60 MINUTES continues in a moment.

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[Announcements]

["THE SELLING OF COL. HERBERT"]

WALLACE: One of the sad legacies of our years in Vietnam is the distrust of the American military establishment the war planted in the minds of millions of Americans. The Pentagon's efforts to obscure the facts, from Tonkin Gulf to My Lai to General Lavelle, seriously damaged the credibility of the military. And one man who helped to breed suspicion in our minds was Army Lieutenant Colonel Anthony Herbert, now retired.

For the past two years Herbert has been stating and repeating his charges that the American military covered up war crimes in Vietnam. Now he has published a book called "Soldier" which he wrote with James Wooten of The New York Times. Its publisher is Holt, Rinehart and Winston, a subsidiary of CBS. The book is a savage indictment of the Pentagon in general and some of its top officers in particular. A good deal of Herbert's firepower aims at proving that his military career was destroyed by the Pentagon only because he tried to report war crimes, atrocities, in Vietnam to his superior officers. They wanted to hear none of it, he says, and they broke him because he persisted.

60 MINUTES set out to investigate the validity of Herbert's allegations. In the course of the last year, producer Barry Lando talked with scores of people in and out of the service - people who have known Herbert and the Army. Here is our report.

DICK CAVETT: My first guest tonight is one of America's great war heroes. And he is also one of its war victims. It's an astonishing story. I'll let him tell the rest of it. Will you welcome, please, Lieutenant Colonel Anthony Herbert. [Applause]

WALLACE: "The Dick Cavett Show" - December 30, 1971. As millions of viewers watched, Lieutenant Colonel Herbert described one of the war crimes he said that he had witnessed in Vietnam. Since it took place on February 14, 1969, he calls it the "St. Valentine's Day Massacre".

HERBERT: He had a woman by the hair with her head bent back - there were four dead males lying on the ground by now - and he had his right arm around her throat with the knife dug in right here. And there was a child holding her leg, screaming, and he had another--the second child buried face-down in the sand with his foot on his head, suffocating him.

CAVETT: Who were the men who were doing this, now?

HERBERT: They were Vietnamese, but under an American's charge.

CAVETT: They would be ARVN?

HERBERT: Well, they were police, is what they really were. They were national police. And just as I looked, he cut the woman's throat and dropped her into the sand. So this made five dead now.

WALLACE: As Herbert tells it, then and now, he tried repeatedly to have this and other alleged war crimes investigated by his commanders in Vietnam. As a result, he says, he was relieved of command and had his career ruined by an Army establishment intent on covering up atrocities.

HERBERT: For people to think that Ernie Medina could have reported those crimes is ridiculous. If Ernie Medina had reported those crimes he'd have been-- the bolt of lightning would have came out of the blue so fast that he wouldn't have known what the hell hit him, you know.

WALLACE: There seemed to be good reason for the attention Colonel Herbert has gotten from the public and the media: he was a hero. After all, even the Pentagon had to admit his Army record was outstanding.

He had enlisted at the age of 17, won 22 medals in some of the bloodiest fighting in the Korean War, wrote an account of his exploits, traded books with World War II hero Audie Murphy. He shot up through the ranks of commissioned officers, served as a Ranger, had duty tours in Europe, the Middle East. Then in February 1969 he was given a combat command in Vietnam. His unit: the 2nd Battalion of the 173rd Airborne, based south of Danang. Again Herbert excelled. In only 58 days he won a Silver Star and three Bronze Stars. But then, abruptly, in April of 1969, he was relieved of command by the same officer who had given it to him, General John Barnes.

BARNES: I thought he was a killer. I thought he enjoyed killing and I thought that he would cause me a lot of trouble in the pacification. I don't think he understood the role.

BARRY LANDO: Do you have any evidence, hard evidence, to show that he was a killer?

BARNES: No, I have no hard evidence other than the fact I know that he enjoyed getting out with squads with an M-16 and leading squads. No other battalion commander did that.

LANDO: Couldn't this just be a sign of bravery?

BARNES: Oh, it certainly could. But the same kind of a thing I didn't want happening in-- when we got to the pacification role.

WALLACE: General Barnes elaborated his suspicions about Herbert.

BARNES: I can't pin this thing anywhere, but I just got the feeling, with all these high body counts he had, that some of them were suspect. And that-- he would tell different stories as to the body count. He'd come in one day and I'd get a report that so many people were killed, and then when I tried to get the details of it there would be a different figure table. And I just didn't have confidence in him. I'd lost confidence in him as a commander with the ability to control his people.

LANDO: Did Colonel Herbert ever formally or informally report any war crimes or atrocities to you?

BARNES: He himself never did to me. Absolutely not. If he had, I would have taken the same action I did when I learned of atrocities anywhere. If they are under my responsibility, I would have court-martialed the man responsible for it, as I told every replacement that came into the brigade.

WALLACE: General Barnes' deputy commander was Colonel Ross Franklin. It was he who recommended to Barnes that Herbert be relieved. One reason, says Franklin, is that he had come to feel he could not trust Herbert's word.

FRANKLIN: Tactically, he was the best battalion commander we had. I counseled Herbert several times and once I counseled him on telling the truth or being more exact in what he said. I told him at that time that he could run circles around all the rest of the battalion commanders if he'd just tell the truth.

WALLACE: Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?

FRANKLIN: No.

WALLACE: Never?

FRANKLIN: Never.

WALLACE: Verbally or in writing?

FRANKLIN: In no way, neither orally or in writing. This-- I had many conversations with Colonel Herbert. We discussed many things, but never war crimes.

WALLACE: After losing his command, Herbert went to Saigon. He requested a formal hearing. An investigation was held. His appeal was denied. Herbert returned to the U.S., was ultimately assigned to Fort McPherson, Georgia. And then in September 1970, 17 months after he had been relieved of command, with the headlines filled with news of the My Lai trials, Colonel Herbert filed his war crimes charges with the Army Inspector General. Six months later, Colonel Herbert went public.

Why would Herbert make such charges if they were just baldly untrue?

FRANKLIN: There's a certain amount of vindiction, certainly. I would say that he probably holds me more responsible for what happened to him than any other officer.

WALLACE: Being relieved of his command?

FRANKLIN: Yes, but I can't really imagine the motivation that would lead to such a monumental thing such as this.

WALLACE: Monumental? What's monumental?

FRANKLIN: He has come up with totally fictional charges that, as far as I'm concerned, has been a hoax on the American people.

WALLACE: You were relieved. You were given a bad efficiency report.

HERBERT [agreeing]: Mm-hmm.

WALLACE: And you say it was your insistence on having war crimes investigated that led to your relief from command, right?

HERBERT: I still say it.

WALLACE: Okay. Now, in almost all the cases that you claim that you reported war crimes, either to Colonel Franklin or General Barnes, we have only your word against theirs. Nobody else was there.

HERBERT: Mm-hmm.

WALLACE: So what we decided to do was to zero in on the one case where there's a possibility, anyway, of proving who's telling the truth - without relying on your word against their word.

HERBERT: Mm-hmm.

WALLACE: And that's the incident of February 14 - the "St. Valentine's Day Massacre," as you've called it. Now, what happened there, briefly?

HERBERT: What happened?

WALLACE: Yeah.

HERBERT: A platoon, I believe it was from B or C Company--

WALLACE: As Colonel Herbert tells it, he spoke with Colonel Franklin twice from the field on February 14. Then, he says, he flew directly back to Landing Zone English to report the killings personally to Franklin.

Well, specifically, on February the 14th in 1969, Colonel Herbert said that he reported to you, first on the radio and then in your command post, the killing of captured Vietnamese by South Vietnamese police while an American advisor was looking on.

FRANKLIN: At that period I was in the Ilikai Hotel in Honolulu, Hawaii, on R & R. I did not return to Vietnam until 16 February, two days after this alleged incident.

HERBERT: I say that he was there.

WALLACE: And that he's lying?

HERBERT: If he says he wasn't there, I say he's lying.

WALLACE: Can you prove it?

HERBERT: No, I cannot.

WALLACE: 60 MINUTES tried to find out who was telling the truth. Checking with the Ilikai Hotel in Hawaii, we found that Colonel and Mrs. Franklin had indeed been registered there from February 7 to late in the afternoon of February 14. That would already have been February 15 in Vietnam. Colonel Franklin also gave us a cancelled check signed by himself and made out to the Ilikai Hotel for the exact amount of the hotel bill. The check was dated February 14. And we spoke with two Army officers who were in Hawaii at the same time. They say they flew back to Vietnam with Colonel Franklin, taking off from Honolulu late on February 14, arriving at Camranh Bay in Vietnam on February 16, local time.

Let me provide something to you.

HERBERT: Okay.

WALLACE: A check, signed by Ross Franklin, 14 February, in Hawaii, for the full amount of that hotel bill that you have there, which means that he had to be in Hawaii to pay his bill himself on the 14th of February; therefore could not have been where you said he was on the 14th of February.

HERBERT: Mm-hmm. I can probably find you checks-- I don't know. I can probably find you-- I don't know about this check. I can probably find--

WALLACE: Wait a minute. I mean, you say--

HERBERT: I see the check.

WALLACE: Yeah, okay.

HERBERT: I can probably find you a hundred checks that I have either dated for another reason, wrote after the fact, misdated, what have you. I don't know. All I know is I saw Ross Franklin there and talked to him. I know that. I know what I saw. I know what I did. And I stick by it and I still say it. And I swear to it and I've sworn to it under oath and I'll swear to it again, you know?

WALLACE: In his book, Colonel Herbert writes that there are several people who can testify that Franklin was in Vietnam on February the 14th. We asked Herbert for the names of those men. We contacted almost every one of them. None could confirm Herbert's claim. Several men serving under Herbert said they had heard Herbert say, while in Vietnam, that he had reported the February 14 killings, but none were certain that he had actually reported them.

BARNES: Why didn't he do something that had a date on it that would prove that he did report those things? He had plenty of time to do it. He left the brigade, he was down in Saigon three months where he

had this court of inquiry, this Article 138. He had plenty of time to jot something down on a piece of paper, to get it notarized. Why didn't he?

WALLACE: You have no documents to show, not a piece of paper to show that you ever reported a war crime to anybody prior to the time that the My Lai trials were going on at Fort McPherson in Georgia. You were in Fort McPherson, Georgia, at the very same time that those My Lai trials were going on and then suddenly you went public.

HERBERT: Let's say that we-- I'm not going to say we don't have documents to show that I reported war crimes in Vietnam. That's not for me to say here. I say that we can prove that I did report them in Vietnam.

WALLACE: You have documents to prove--

HERBERT: I'm not going to say we have documents or not. I just say we have statements - sworn statements - and testimony that will prove that I reported war crimes in Vietnam.

WALLACE: Have you-- have you published them in your book?

HERBERT: I don't think so.

WALLACE: Why?

HERBERT: I didn't-- I had no reason to. It was already in the paper, other things. I don't know why. I have lawyers, just like you have lawyers. We didn't put everything out we have.

WALLACE: Earlier, Herbert had tried to put the whole question of his reporting or not reporting atrocities in a different light.

HERBERT: Let's say I didn't, just for the sake of the discussion. It would make absolutely no difference if I waited five years to do it. The motive would make no difference whatsoever. The question is: did the crimes occur or didn't they?

WALLACE: Oh.

HERBERT: Were Colonel Franklin and General Barnes well aware of them or weren't they? I say they were and I say I reported them, and it's still there and it still stands.

WALLACE: No. The point is there's no dispute that war crimes occurred in Vietnam. The dispute, it seems, is this: you've called Franklin a liar.

HERBERT: Yes.

WALLACE: You've called Barnes a liar.

HERBERT: Yes.

WALLACE: You said the Army, really, deprived you of your military career because you insisted upon reporting war crimes and they wanted them covered up. And that's really what the issue is here.

HERBERT: And I still say it.

WALLACE: The sprawling U.S. Army base at Longbinh, just outside Saigon. After he lost his battalion, Colonel Herbert went to Longbinh to appeal his relief from command - and also, he says, to present his war crimes charges. One of the officers he spoke with was the top U.S. military lawyer and judge in the country, Colonel John Douglass. Herbert claims that Douglass listened to his story and then told him he wouldn't touch war crimes charges against a general with a ten-foot pole.

DOUGLASS: The story, of course, is not correct. He has not recalled the facts, apparently, as they really existed.

WALLACE: All right, what were the facts?

DOUGLASS: Well, the facts as they really existed were that he was brought to my office by an assistant inspector general, as I recall it. That officer explained that Colonel Herbert had been relieved of command and had a complaint about his relief. I said, "Well, I better turn this over to my assistant, Colonel Rector" - who was in the room right next to mine--

WALLACE: Wait a minute. Did he mention war crimes to Colonel Rector?

DOUGLASS: I don't know. If he did, he never mentioned-- Colonel Rector never told me about them. And as a matter of fact, Colonel Rector's comments to me were that his complaint was that he'd been improperly relieved and he'd-- there was some jealousy, some hard feelings between Franklin and whoever the general was up there, and Herbert.

WALLACE: Barnes.

DOUGLASS: General Barnes and Colonel Herbert. And that he'd been improperly relieved. And it looked like enough of a case that we ought to get a full investigation. I can't believe that if there were war crimes involved and we were trying to stay out of it, as indicated by this passage you've just read to me, that then we'd recommend a full-scale investigation - which we did.

WALLACE: Douglass said that he was irritated by the implication that he wouldn't bring charges against a general.

DOUGLASS: And I am annoyed, I'm hurt, I'm-- I feel that this is an indication that I'm not of a strong enough character to be either a lawyer or an Army officer, and I happen to be both and I'm proud of being both.

WALLACE: But why haven't you said this up to now?

DOUGLASS: Nobody's asked me.

WALLACE: He says you-- He's a gentleman, so he won't--

HERBERT: Yeah, and I'm not.

WALLACE: --so he won't call you dirty names, but he says that it's absolutely made up out of the whole cloth. He said that he barely talked to you, you didn't mention war crimes, that he bucked you to his next-in-command, a fellow by the name of Rector.

HERBERT: That's not true. I never saw Rector, ever.

WALLACE: Okay.

But when 60 MINUTES contacted Colonel Rector, he said that he had indeed spoken with Colonel Herbert at some length about his relief from command, but that Herbert never claimed that war crimes had anything to do with it.

In fact, over the past several months, we have spoken with many men who saw Herbert after his relief in Vietnam. Some are still in the service, some are out. Most of them admire Herbert, yet to a man they say that Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.

You claim that the investigations into Barnes and Franklin, conducted by the Army and based on your charges, was a whitewash, right?

HERBERT: Mm-hmm.

WALLACE: Do you remember an attorney by the name of Ken Rosenbloom?

HERBERT: Yes, I do. I was the one that put you in contact with him.

WALLACE: Right.

While in the Army, handling the Barnes investigation, Ken Rosenbloom was a captain in the Judge Advocate General's Corps. He is now an assistant district attorney on Long Island in New York.

Now, he has charged, as Herbert has charged all along, that the Army's investigation into charges against General Barnes were a whitewash. You worked on the Barnes investigation.

ROSENBLOOM: That's correct. I did.

WALLACE: What do you think?

ROSENBLOOM: It certainly wasn't a whitewash. We traveled all over the country. We took thousands and thousands of pages of transcript. We spoke to witnesses in person and over the telephone. We had access to all the CID files. We were refused nothing and we were permitted to go anywhere that we desired and talk to anyone we desired, in or

out of them. We had all of the Army's facilities made available to us, and where we wanted to go, we went.

WALLACE: Were present throughout the whole business of investigating Herbert's charges against General Barnes?

ROSENBLOOM: Yes, I was, sir.

WALLACE: You came up with a verdict that the charges just didn't hold water.

ROSENBLOOM: Essentially that's correct, sir. I tried to approach it in a very open-minded way. I have no grudge against the Army, no grudge against Herbert. I knew I was getting out. I was not a career man and so I had no desire to protect the Army nor did I have a desire to protect Herbert.

WALLACE: Are you trying to set the record straight about Anthony Herbert?

ROSENBLOOM: I don't know if the record requires to be set straight. Nobody ever asked me before what happened at the investigation.

WALLACE: He says no cover-up. He says that they tracked down every lead that he gave them - many of them provided by you - and more. And when they contacted those people they just could not confirm what you said they knew or had seen.

HERBERT: Then let them present the statements and the evidence. I told you the other military lawyer is Dick Heintz, who will verify what we have said. There are-- The documents are there. Then let the Army release all the documentation and let the people judge for themselves.

WALLACE: He contacted Herbert's military lawyer, Captain Heintz. He said that, from the few documents that he had seen, he suspected the Army was not doing its best to investigate Herbert's charges. But he said that he could not be at all certain of that until the full investigations are made public.

Another thing that we found out checking out Herbert's book: Although several men who served with Herbert say it's not so, there are others who claim that Herbert was an officer who could be brutal with captured enemy prisoners himself.

You used to have a radioman by the name of Bruce Potter, right?

HERBERT: Yes, I had. Sergeant Bruce Potter.

WALLACE: A man you've spoken highly of and who speaks highly of you.

HERBERT: And I still do, no matter what [indistinct] I still do.

WALLACE: All right.

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POTTER: One day we captured two detainees and we had an interpreter with us. We were on a recon mission. And we took one of the detainees in the air, because neither of them would talk on the ground. And we took him in the air and Colonel Herbert held him in the door of the helicopter. The helicopter then made a bank to the left and Colonel Herbert jolted him a little bit to scare him into talking - to think he was going to be thrown out the door. And the interpreter that was with us in the helicopter was questioning him constantly through the flight. And the helicopter then made another bank over the mountains and Colonel Herbert gave him a bigger jerk out the door, and he started talking. And then we flew across the area where the other detainee was being held and threw a sandbag out full of clothes and rocks and things of this nature into the area where he was. He was blindfolded on the ground. And he apparently started talking then, because he was talking very well when we came down. And both of them-- We got quite a few-- quite a bit of information out of them. They were trail watchers.

LANDO: He started talking why?

POTTER: Because he thought that the other detainee we took in the air was thrown out of the helicopter and that was him hitting the ground rather than the sandbag. This was a method that was thought up on the spur of the moment, I believe, and it worked, definitely worked.

LANDO: Who thought it up?

POTTER: It must have been Colonel Herbert. Had to be.

HERBERT: This is not true.

WALLACE: In other words, Potter's a liar?

HERBERT: No, Potter's mistaken. Potter may remember somebody doing that--

WALLACE: No, no, no, no. Potter told us that he was with you, Colonel Herbert, in the chopper as it went on and he said it was your idea.

HERBERT: I understand what you are saying that Potter said. I say that it is untrue--

WALLACE: All right. All right, now--

HERBERT: --you know?

WALLACE: --another man: Bob Stemmies.

HERBERT: Bob Stemmies?

WALLACE: Do you know him?

HERBERT: No, he wasn't-- didn't work for me, but I do know him, yes.

WALLACE: Well, he was a military intelligence sergeant.

HERBERT: Yes.

WALLACE: You spoke very highly of him on the Cavett show back in '71 - September.

HERBERT: Yeah, I spoke-- Well, I knew about him as an IG, yes.

WALLACE: Stammies told us that he was present once with you as a Viet Cong nurse was being interrogated by ARVN troops, being beaten by them to get her to talk, you were there, stood by, did nothing.

HERBERT: Well, let me tell you this. As long as I was in Vietnam, my unit never captured a single nurse. And you won't find anything about a nurse in any of our records.

WALLACE: Do you remember a chopper pilot by the name of Mike Plantz?

HERBERT: No, because Mike-- I don't remember him, because Mike Plantz never flew me in Vietnam.

WALLACE: He was based at Landing Zone English.

HERBERT: Yes.

WALLACE: He claims that he was flying a chopper for you, saw you beat up a woodcutter after you went down to check a group of them out; also says that he saw you beat up a VC prisoner being brought back by you to Landing Zone English.

HERBERT: It's false. It's false.

WALLACE: Bill Hill, one of your top company commanders--

HERBERT: Yes.

WALLACE: --has told us that Herbert "is the best battalion commander I've ever had, but for some reason he's become a liar. It's all so much garbage."

HERBERT: If he's still in the Army, he will do the same as other officers will do, I'm sure, in order to keep their career going. These men are not going to destroy themselves.

WALLACE: In other words, he has simply chickened out and is going along with the Army line against Herbert?

HERBERT: I don't know.

WALLACE: Well, that's what you're suggesting.

HERBERT: I don't even know he said it. You're telling me he said it. But I'm sure he did say it if you say he did. I'm telling you, if Bill Hill feels I'm lying, he's entitled to have that opinion, right?

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WALLACE: In checking out Herbert's book, "Soldier," we found numerous stories that, according to the people mentioned in those stories, are not true. One such man is Major Jim Grimshaw, a former company commander who served under Herbert in Vietnam. He thinks that many of the charges in Herbert's book, like the politicking that goes on among Army officers - especially West Point officers - are true. Like many of the officers who served under Herbert, Grimshaw has the highest praise for him. When I interviewed him in the Pentagon, Major Grimshaw was frank to admit his admiration.

GRIMSHAW: I would stick up for Tony Herbert for anything. I'd follow him in combat because I don't think I could keep up with him, he was such a fine combat leader. However, I feel that as an individual, let alone an Army officer, a man must have integrity. Therefore, I would not lie for him or for anybody else.

WALLACE: I asked Jim Grimshaw about the stories in the book that related specifically to him. The most dramatic involved an incident where he and his men supposedly tried to flush some Viet Cong soldiers from a cave without injuring some female civilians also in the cave.

Major, let me read you from the book, from Herbert's book. He says:

> Grimshaw suddenly dropped down to his knees and crawled into the cave, whispering softly in Vietnamese. A couple of minutes later, as his men watched open-mouthed, he, Grimshaw, emerged from the cave carrying a baby in his arms. The three Viet Cong soldiers and the two women followed closely behind. It was cool. Nobody asked him why he did it. He never explained. I submitted him for the Silver Star, the country's third-highest combat decoration. He more than deserved it, but he never received it.

GRIMSHAW: I did not do that.

WALLACE: You didn't go in, come out carrying a baby, followed by three VC soldiers and two women?

GRIMSHAW: I did not.

WALLACE: Did he submit you for the Silver Star? Because I don't see your-- At that time?

GRIMSHAW: I have no recollection of being subm-- being recommended for the Silver Star for that incident. There was another incident, in which my first sergeant recommended me.

WALLACE: But not Herbert?

GRIMSHAW: But not Herbert.

WALLACE: In sum, Major, what do you think about Tony Herbert?

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GRIMSHAW: You're asking me before or now?

WALLACE: Now.

GRIMSHAW: Having read the stories about me, and only about me--

WALLACE: Right. Things of which you have certain knowledge.

GRIMSHAW: Right. I would say that there is a kernel of truth, there is a nucleus of truth, but unfortunately, I think that he has expanded some of these stories, which may be great reading to the public but not entirely true. And--

WALLACE: You seem to say that with--

GRIMSHAW: I say it with resignation--

WALLACE: Reluctance?

GRIMSHAW: --dismay and reluctance. Believe me, if I felt that that was the truth, if I felt that, you know, that was the undeniable truth, I'd stand up in front of everybody and say, "This is the truth." But he's blown it out. He's gone beyond that point and it's a shame.

WALLACE: Do you believe that he was relieved because he wanted to push allegations of war crimes and atrocities? Do you think that's the case?

GRIMSHAW: I don't think that was the cause. I just don't think that was the truth. I feel, somehow, somebody had it in for him, and I don't know who. And it's too bad.

WALLACE: Here we are in the Pentagon. Did anybody here order you to come here and talk to us?

GRIMSHAW: No.

WALLACE: You're your own man?

GRIMSHAW: I'm my own man. I like to think I am. I hope I am.

WALLACE: Jim Grimshaw telephoned Colonel Herbert after we had talked to him. Herbert called us with that news and he claimed that Grimshaw told him that he had spoken with us in the Pentagon only under pressure - that his career was on the line. Herbert told us that was the reason that other officers had also come out against him. When we checked with Grimshaw, he denied telling Herbert that. So to settle the argument, we flew Grimshaw and his wife to New York and had them wait outside listening to our interview with Herbert. When Herbert again intimated that Grimshaw had been pressured by the Pentagon to bad-mouth Herbert, we told Herbert that Grimshaw was there.

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HERBERT: Bring him in.

WALLACE: Fine.

HERBERT: Good. And ask him the same questions.

WALLACE: You can ask him whatever questions you want to. Here he is right now.

HERBERT: Hello, Jim.

GRIMSHAW: Hi, how are you doing?

HERBERT: Very fine.

WALLACE: Jim, have you heard what's been going on between the Colonel and me?

GRIMSHAW: Yes.

HERBERT: Okay.

GRIMSHAW: We started on line at the base of the hill searching caves. You were with me probably 90% of the time.

HERBERT: Yes, that's why I put in for the Silver Star, yes.

GRIMSHAW: But I'm saying--

WALLACE: Wait a minute. You told me that he didn't put in for the Silver Star for you. [Crosstalk]

HERBERT: --saying I didn't put you in for a medal on that, Jim?

GRIMSHAW: Well, because I don't remember you ever putting me in for a medal.

HERBERT: How about the rest of the things in the book?

WALLACE: Have you read the book? Have you read the book?

GRIMSHAW: Yes, I have read the book.

WALLACE: Do you think it's accurate, by and large?

GRIMSHAW: Well, the incidents-- We have to talk about the incidents that I'm personally involved in.

WALLACE: All right. Sure.

GRIMSHAW: So, now we're talking three incidents, when you get right down to it.

WALLACE: And you've told me--

GRIMSHAW: I'm telling you two-thirds, then, are not true.

WALLACE: Were you under any pressure, Jim Grimshaw, to-- from the Pentagon or from your commanding officer to show up at the Pentagon for an interview?

GRIMSHAW: No.

HERBERT: Now, you told me that--

GRIMSHAW: Absolutely not.

HERBERT: You told me that.

GRIMSHAW: And I wasn't briefed.

WALLACE: Later in the interview, Grimshaw told Herbert he should have checked out his stories with the people whose names appear in the book.

GRIMSHAW: Why didn't you call guys like myself or Hill or some of these guys?

HERBERT: Okay--

GRIMSHAW: You know, you're making us a public figure--

HERBERT: Okay, wait a minute, Jim.

GRIMSHAW: --whether you want-- You know, you're trying to do me a very good job and, in a sense, maybe I think it's because of all the problems that occurred and you maybe want to put us in a good light to the American public. But now you've made me a public figure. I can't help it; I have to speak out.

WALLACE: The deeper we got into this investigation, the more we felt that the way in which the media, including CBS News, reacted to Herbert's allegations was almost as interesing as Herbert's story itself. Several reporters did make an effort to check out Herbert's claims, found his case was far from clear-cut and made that obvious in their reports. Many others did not. The New York Times did more, probably, to publicize Tony Herbert's story than any other paper. When Herbert passed a lie-detector test on whether or not he had reported war crimes to Franklin, the Times gave it big play. But when the Army said that Colonel Franklin, the man Herbert had accused, had also passed a lie-detector test, other papers reported it but there was not a word about it in the Times.

Attorney Ken Rosenbloom, the former Army lawyer who investigated many of Herbert's charges, says the attitude of the media towards Herbert was understandable.

ROSENBLOOM: Well, he's highly decorated and a respected soldier, and he makes these charges and he gets a lot of newspaper coverage about it. Because of the temper of the times and what the country wanted

to hear, perhaps, or because the media was looking for another hero, they tended to accept these allegations uncritically.

WALLACE: The New York Times in Vietnam wanted to talk to you and you wouldn't talk to them?

FRANKLIN: No.

WALLACE: Well, you wouldn't talk to them?

FRANKLIN: Well, the logical conclusion to draw from what you're saying, then, is that if you won't talk to the press, then they can say anything they want.

WALLACE: No.

FRANKLIN: But there's still a responsibility to present the truth.

BARNES: During the long investigation on me, the Army's policy was not to put out any statements at all because of prejudice to others involved in the investigation while it was going on. Therefore, the press had no place else to go for information but back to Herbert, where the source was. And I just think that the press did what they could but they weren't given both sides of the stories. Right or wrong, that's-- I think that's what happened.

LANDO: Why not make the investigation public, then?

BARNES: Don't ask me. If I was in charge I would, but I'm not in charge.

HERBERT: One of the things I have said from the beginning is that you'll never know for sure. No one will know the whole truth until the Army releases for publication every single document and statement they have, which they have not done unless they've let you read them all. And the second portion is, until they have a full Congressional inquiry to find out is Herbert telling the truth? Is Herbert lying? Is Ross Franklin telling the truth? Is Ross Franklin lying? And lay it all out there for everybody - and I'm sure that's what you're trying to do to some extent tonight and I go along with it.

WALLACE: Okay.

The Army could indeed help resolve the controversy. They could open their files to a public airing. They could make themselves available for questioning about the whole Herbert business. But they won't. I asked former Army Chief of Staff William Westmoreland to talk about it. He refused to be interviewed. I asked General Winant Sidle, the Army's Public Information Chief. He refused, too. Why? We heard two lines of speculation among Pentagon people. One is that the Army doesn't want to help make a martyr of Tony Herbert. And the other is that during their various investigations into Herbert's charges, the Army found so many true stories of war crimes that, irrespective of whether Tony Herbert had reported any of them, the Army just doesn't

66 a

want to wash that kind of dirty linen in the open. Perhaps the best way to stop all speculation is to do what you heard Anthony Herbert and General Barnes suggest a moment ago: make the Army investigations public.

EXHIBIT A

THE HERBERT AFFAIR

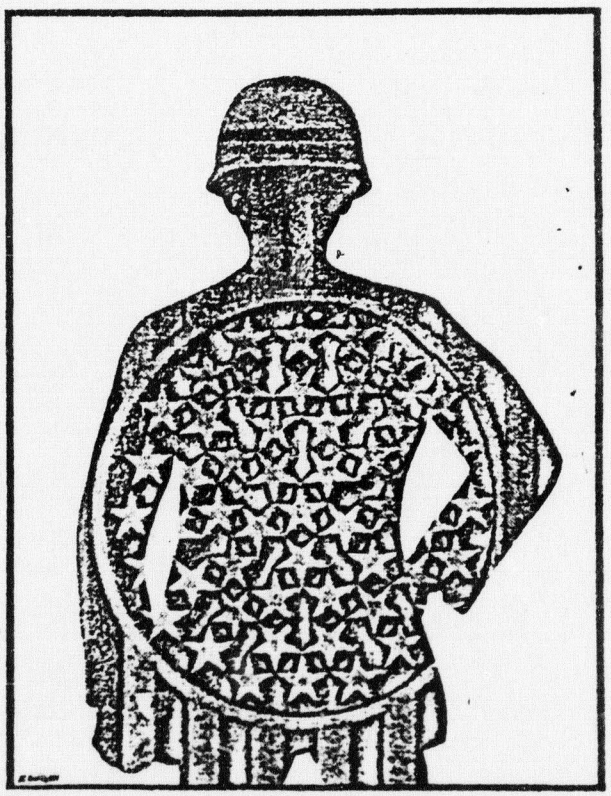
by Barry Lando

He seemed to be the perfect soldier, a hero in Korea and in Vietnam. Then he was driven out of the Army, his career ruined because he tried to prevent his superiors from concealing war crimes against the Vietnamese. That was the story a television producer persuaded his superiors at CBS should be presented to a nationwide audience. As the producer and his associates began assembling the facts, they found it changing into a very different story, one that left the reporter disillusioned and the hero threatened with decanonization. The producer here tells how the case unfolded for him, from his first, convincing interviews with Lieutenant Colonel Anthony Herbert, through intensive researching of Herbert's alarming charges against fellow Army officers, to a dramatic confrontation between Herbert and some of those who disputed him on the CBS program, *Sixty Minutes,* shown on February 4 of this year. It is a tangled story, to say the least. One of its lesser anomalies: Herbert's book *Soldier,* now profitably riding the best-seller list, is published by Holt, Rinehart and Winston, which is owned by CBS, the organization that has done the most to attack the book's integrity.

I first met Lieutenant Colonel Anthony Herbert in June, 1971. I was an associate producer on the CBS Weekend News, putting together a report about prisoners of war in South Vietnam. I was looking for American veterans with firsthand accounts of brutal treatment meted out to Viet Cong and North Vietnamese POW's. Lieutenant Colonel Herbert seemed a good prospect. A few months earlier, in March, he had publicly charged two Army officers, Brigadier General John W. Barnes and Lieutenant Colonel J. Ross Franklin, with trying to cover up war crimes in Vietnam.

When I contacted Herbert by phone in Atlanta, he said he could provide me with just the stories I was looking for. He spoke of cold-blooded murder, of women prisoners having the skin ripped off their breasts by bamboo flails. Casually, Herbert added that he had just received notice from the Army that he had been passed over for promotion for the second time and, thus, would be forced to retire by February, 1972. That in itself was a hell of a story, I told him, and I arranged to film an interview the next day.

When we met, I found his appearance as striking as his rhetoric. Tall, iron-hard, with close-cropped hair, he was a military man all the way and had a chestful of decorations to prove it. The story he told me was the same as the one he had



told reporters from the beginning. While commanding a battalion of the 173rd Airborne Brigade in Vietnam, Herbert had personally witnessed several war crimes. The most horrifying was the one where Vietnamese police, with an American adviser standing by, had murdered four prisoners. Herbert claimed he came upon the executions just as they were finishing. "There were four dead already and they had a knife at the throat of a woman. Her baby was screaming and clutching at her leg, and this other child was being suffocated. One of the men was shoving its face into the sand with his foot. I told them to stop, but the man holding her just looked at me and slit her throat and dropped her to the sand." Since those killings took place on February 14, 1969, Herbert calls them the "St. Valentine's Day massacre."

According to Herbert, he immediately reported all the atrocity cases he witnessed to Colonel J. Ross Franklin, deputy commander of the 173rd. But, Herbert says, Franklin showed no interest in investigating the charges. "He would say I was getting too soft for war, or I was lying." Herbert said he also reported three of the crimes, including the February 14 slayings, to General John Barnes, commander of the 173rd.

Then, his story continues, he kept badgering Franklin about the investigations until abruptly on April 4, 1969, he was relieved of command. During the fifty-eight days he had led the second battalion, his men had outperformed every other battalion in the brigade. Herbert had been awarded one Silver Star, three Bronze Stars, and had been recommended for the Distinguished Service Cross. "All of a sudden," he says, "Barnes and Franklin decided I was no longer fit to command. It was the war crimes. They wanted to get rid of me."

In Saigon, Herbert appealed his relief from command, a full-scale hearing was held, and his appeal was turned down. Herbert said he attempted to make official reports of war crimes to several top officers but "they all refused to receipt for my charges." Herbert's relief from command was followed by a bad efficiency report, written by Colonel Franklin, accusing him of having "no ambition, integrity, loyalty, or will for self-improvement."

Over the following months, said Herbert, he vainly attempted to have his war crime charges investigated but was continually put off. Finally, in September, 1970, he made formal war crime charges to the Army's Criminal Investigations Division at Fort McPherson, Georgia. Then, when it looked as if the CID, too, was dragging its heels, on March 12, 1971, Herbert formally accused Barnes and Franklin of trying to cover up war crimes.

Though the investigations were still going on, Herbert said, he doubted that Franklin or Barnes would ever be prosecuted. Still, he had hopes for the Army. "I want to make this an honorable army. I want to help correct it. I wouldn't quit under any circumstances."

I was delighted with the interview. Here was one of the Army's own honest-to-God heroes testifying against it. Herbert *was* a hero. He had enlisted at seventeen, won twenty-two medals in some of the bloodiest fighting of the Korean War, then was sent on a promotional world tour by the Army as an example of the finest of U.S. fighting men. He advanced through the ranks of commissioned officers, was a Ranger instructor, a Green Beret, and served in the Middle East and in Europe. His efficiency reports were always outstanding.

Why shouldn't a reporter be impressed? For months the Army refused to make any comment on Herbert's charges on the grounds that investigations were still going on. With the Pentagon's recent record from the Tonkin Gulf to My Lai, one would be skeptical of an official explanation. I became fascinated with Herbert's story and discussed with him the idea of doing a book about him, or in collaboration with him, though I was in the midst of a job change at CBS. The idea faded away.

In a July, 1971, interview in *Life* magazine, Herbert suggested that war crimes might stop "if we'd hang a couple of senior commanders." In September came his big breakthrough: a lengthy article ("How a Supersoldier Was Fired From His Command") in the Sunday magazine section of the New York *Times*. The piece was written by the *Times* Southern correspondent James T. Wooten. Wooten had covered Herbert since he first made his charges public, and had come to believe fully in the man and most of his claims.

At the time, and for months after, I thought Wooten's article to be an excellent description of Herbert and his case. Unlike several reporters who became suspicious of Herbert soon after they started checking into him, I didn't develop doubts until after several weeks of research. Wooten, who later collaborated with Herbert on his book, *Soldier*, today says he still believes in Herbert. He says he did try to contact General Barnes, but was told that while the Army investigations were under way, Barnes would be unavailable. Franklin had refused to talk with New York *Times* reporters in Vietnam. Wooten says he interviewed none of the other individuals mentioned in *Soldier* to try to check out Herbert's story. As he explains it, the book is not a work of reportage but essentially an autobiography. It ranges from boyhood memories, through Herbert's Korean and cold war experiences, to Vietnam. Although the crucial issue in the book becomes Herbert's war crimes charges, he also accuses the Army of failing to wage the war aggressively, and offers a general critique of the Army on a number of counts.

The *Times* piece led to Herbert's appearance on

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the Dick Cavett Show, a performance that, according to a delighted Cavett, elicited more viewer response than any other Cavett show. Many politically conservative viewers were just as outraged as liberals were by what the Army seemed to have done to Herbert.

The Herbert case began to arouse Congress. Prodded by Representative Edward Hebert, chairman of the House Armed Services Committee, Secretary of the Army Robert Froehlke announced on October 8 that the Army had decided to reverse itself and toss out the poor efficiency report that had brought Herbert's career to a dismal halt. But that decision, said Froehlke, had nothing to do with Herbert's war crime charges. Many Army officers were outraged and the press had a field day. How could the Army deny Herbert's accusations and at the same time redeem him?

On it went, Herbert involved in one flap after another as the Army assigned him to ridiculous jobs and temporarily blocked a second appearance on the Dick Cavett Show. Finally, in November, 1971, Herbert, claiming continued harassment, announced that he had decided to retire from the Army. There was more outrage from the press. "His retirement," the *Times* editorialized, "will leave him free to continue, as he has pledged, a battle that involves far more than his personal honor: the integrity and effectiveness of the U.S. Army." The Knight newspaper chain weighed in: "Shame on the Army for making a scapegoat of Lt. Col. Anthony Herbert." An article in *The New Republic* said Herbert's resignation "is a disgrace to the Army and a tragedy for the nation. The facts about this matter are by now clear enough."

They really were not. For several months, while the Army was investigating Herbert's accusations, the Army General Counsel ordered those officers involved in the charges to keep silent. That order left many officers, particularly several who had served in the 173rd Airborne Brigade, seething. Herbert, on the other hand, continued to broadcast his charges.

When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.

The Army also produced an official "fact sheet" disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven "had sufficient substance to warrant action or further investigation." Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence, other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.

Fueled by such information and interviews provided by the Army, several reporters began to write pieces seriously questioning Herbert's claims. Critics included liberals and conservatives: Paul Dean of the Arizona *Republic*, George Crile of the Ridder newspapers, Ken Reich of the Los Angeles *Times*, Peter Braestrup of the Washington *Post*.

When the Pentagon told Mort Kondracke, the Washington reporter for the Chicago *Sun-Times*, that Franklin had passed a lie detector test denying Herbert had ever reported war crimes to him, Kondracke wrote a lengthy article on the Army's claim. But the New York *Times*, which had given considerable space to earlier news that Herbert had passed a lie detector test, made no mention of the Army's report concerning Franklin.

COL. FRANKLIN: *Tactically, he was the best battalion commander we had. I counseled Herbert several times and once I counseled him on telling the truth or being more exact in what he said. I told him at that time that he could run circles around all the rest of the battalion commanders if he'd just tell the truth.*

MIKE WALLACE: *Did Colonel Herbert ever report war crimes or atrocities of any nature to you, Colonel Franklin?*

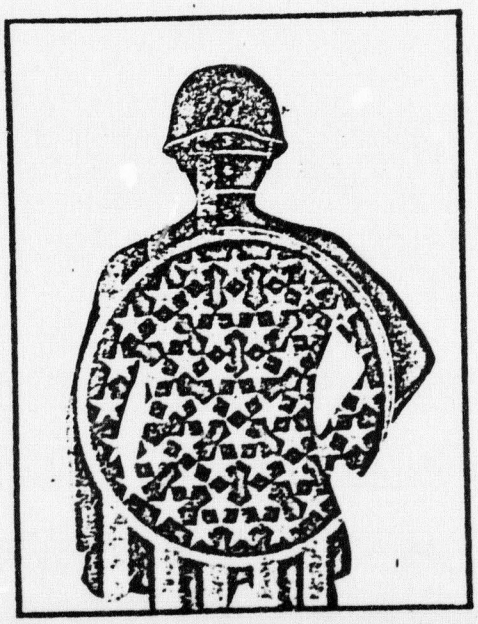
FRANKLIN: *No.*

WALLACE: *Never?*

FRANKLIN: *Never.*

WALLACE: *Verbally or in writing?*

FRANKLIN: *In no way, either orally or in writing. I had many conversations with Colonel Herbert, we discussed many things but never war crimes. . . .*



WALLACE: *Why would Herbert make such charges if they were just baldly untrue?*
FRANKLIN: *I would say that he probably holds me more responsible for what happened to him than any other officer.*
WALLACE: *Being relieved of his command . . . ?*
FRANKLIN: *Yes. But I can't really imagine the motivation that would lead to such a monumental thing such as this.*
WALLACE: *Monumental, what's monumental?*
FRANKLIN: *He has come up with totally fictional charges that as far as I'm concerned, it's been a hoax on the American people.*

Sixty Minutes, February 4, 1973

By the end of 1971, the barrage of charges and countercharges over the Herbert affair had tapered off. The ambivalent conclusion of much of the media was summed up by the title of a piece in the *National Observer:* "Colonel Herbert: A Hero or a Liar."

The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges, kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him. Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine, or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.

Since the first glowing report I had done on Herbert, I had gone to work as a producer for *Sixty Minutes.* One of the first things I did was to push for a story on Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reporters, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soldiers who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I *wanted* to believe in Herbert and I now see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.

That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the *Sixty Minutes* show on him was being postponed because we were now planning to devote the full hour to him—his was such an important story—rather than the usual fifteen- or twenty-minute segment.

This was only a minor piece of fiction, but it was without foundation. I had personal knowledge of that. Something finally snapped. The inconsistencies, the evasions I had been so eager to overlook, now took on a different hue.

In November, 1972, a green-bound uncorrected proof of Herbert's *Soldier* arrived from the publishers. Herbert had shared advance payments of more than $100,000 with Jim Wooten and their agents for the book. It would be published in a few weeks to almost unanimously favorable reviews.

After being off on other stories, I was back onto Herbert. Over the next few weeks, *Sixty Minutes* researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in *Soldier.* One after another refuted many of Herbert's claims.

By the time we were ready to interview Herbert (and others) for the *Sixty Minutes* show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of *Sixty Minutes)* and to defile his true story.

The key point in the whole Herbert affair was not whether atrocities had occurred—the Army admitted that some of those described by Herbert did

happen—but whether Herbert had actually reported them, and, because he insisted on trying to get them investigated, had had his career ruined by a military establishment intent on covering up war crimes. It was only by claiming to be a martyr that Herbert had gained such national prominence.

But how to prove one way or another whether Herbert had reported war crimes in Vietnam? Each instance he cited was a case of one on one: Herbert's word against Franklin's or Barnes's. It was only on my fifth or sixth reading of the Army's fact sheet that one item stuck out: Herbert, the Army claimed, could not have reported the St. Valentine's Day killings to Franklin on February 14, as he described, because Franklin was on R&R in Hawaii on that date and returned to Vietnam only on February 16, Vietnam time.

Yet in *Soldier* Herbert claims it was Franklin who, on February 14, personally ordered Herbert by field radio to turn his prisoners over to the South Vietnamese police. And, after the murders, Herbert says he spoke again by radio to Franklin, then flew directly back to brigade headquarters to report the crime to Franklin.

"Herbert, you're a goddamned liar," Franklin exploded, according to Herbert's book. Herbert offered to get statements to prove his charge. Franklin, wrote Herbert, "stood up, too, and came right up against me. We were nose to nose. 'No, Herbert, no, you won't do that,' he said. 'I'll get the statements and you, Lieutenant Colonel Herbert, will do exactly what I say. Understand?' "

We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14. The Army put us in contact with two officers who claimed they had flown with Franklin to Hawaii on February 9 and returned with him to Cam Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers admitted to disliking Herbert. We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Illikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since R&R is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.

To substantiate this, Herbert claims in *Soldier* that the receipt Franklin produced from the Illikai Hotel was signed by his wife. "Did Franklin, an airborne colonel, just stand by while his wife handled the payment of their hotel bill? It doesn't add up. You're on R and R, and the wife joins you. Five days later you head back to Vietnam and your unit, and your wife, as many of them do, stays on for a day or two."

At our request, Herbert sent us a copy of the hotel "receipt" signed by Mrs. Franklin. A check with the Illikai showed that what Herbert had was not the receipt, but the *registration form*. That seemed to buttress Franklin's claim that his wife had checked in a couple of days before him.

Colonel Franklin also gave us a canceled check, dated February 14, 1969, signed by him and made out to the Illikai for the hotel bill. It could not have been postdated because it was made out, in handwriting apparently the same as the signature, for the exact amount of the final bill, down to the last penny. Nor could it have been mailed later, since it was cashed the first business day after it was written.

HERBERT (on being shown Franklin's check): *I can probably find you checks, I don't know, I can probably find you—I don't know about this check, I can probably find you—*
WALLACE: *Wait a minute, you . . .*
HERBERT: *I see the check . . .*
WALLACE: *OK.*
HERBERT: *I can probably find you a hundred checks that I have either dated for another reason, wrote after the fact, misdated—I don't know. All I know is that I saw Ross Franklin there and talked to him. I know that, I know what I saw, I know what I did. And I stick by it and I still say it. And I swear to it and I've sworn to it under oath. And I'll swear to it again. You know.*

In fact, in *Soldier* Herbert is totally confused on his dates. He says that Franklin was not present when Herbert took over command of the battalion on February 6 because he "had gone on R&R to Hawaii." Two days later by his account, on February 8, "Franklin was back behind his desk, and he

greeted me warmly." But when Herbert comes to explain Franklin's hotel receipt, he places him in Hawaii from February 7 (February 8 Vietnam time) to February 12.

In *Soldier* Herbert claims there are several people who had seen Franklin in Vietnam on February 14. We asked Herbert for names. Not one of those people, in the Army or out, on the record or off, could back up Herbert's claim.

The key person was Captain Bill Hill, a strapping, blond, former football player from the University of Oklahoma, who had served under Herbert in Vietnam and had had nothing but praise for him. When Herbert and I phoned Hill from Atlanta in March, 1972, Hill said he thought Franklin had been in Vietnam on the fourteenth. Later, when I spoke with Hill by phone, he said he could not be sure he had seen Franklin there. I relayed that information to Herbert. A few hours later still, Herbert called me back, claiming that Hill had phoned him to say he clearly remembered seeing Franklin returning from R&R on the fourteenth, that because he was still in the Army and had a career to worry about, he didn't want to get mixed up in Herbert's case, and that from now on, both Herbert and the press should leave him alone.

I then called Hill and asked if I could meet him; he said, yes, no problem. I wound up spending three hours talking with him at the Oklahoma City airport. Contrary to what Herbert had led me to believe, Hill was completely straightforward.

"Herbert," he said, "is a junior Patton. He was a great battalion commander, but he was in the wrong war. In another war Herbert might have become Chief of Staff, but this war was too political. The thing he loved was fighting, combat, but with pacification, fighting was gone."

Hill denied telling Herbert he was certain he had seen Franklin returning to Vietnam on February 14. He said he had heard Herbert talking about the killings on the battalion radio that day, but did not know who he was talking to. Nor could he be sure that Herbert had in fact reported those killings to brigade.

Hill also vehemently denied telling Herbert he couldn't talk because he was worried about his career. "Herbert has gone off the deep end on a bunch of this. I used to rave about him to my wife. It kills my soul about him because I admired him so much."

A few weeks later, after Hill had had a chance to read *Soldier,* I spoke with him again. "Herbert is the best battalion commander I ever had," he said. "But for some reason he's become a liar, it's all so much garbage."

WALLACE: *Bill Hill, one of your top company commanders, has told us that Herbert is "the best battalion commander I ever had. But for some reason he's become a liar, it's all so much garbage."*

HERBERT: *If he's still in the Army, he will do the same as other officers will do, I'm sure, in order to keep their careers going. These men are not going to destroy themselves.*

WALLACE: *In other words, he has simply chickened out and is going along with the Army line against Herbert?*

HERBERT: *I don't know. I don't know that he said it. You're telling me he said it. I'm sure he did say it if you say he did. I'm telling you, if Bill Hill feels I'm lying, he's entitled to that opinion, right?*

Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. He had no sons.

After talking with scores of men who had known Herbert in Vietnam, many of whom still admire him, we could not find a single person who believed that Herbert had been relieved for trying to get war crimes investigated. Most gave other reasons, from personality conflict between Franklin and Herbert, to Barnes's claims that Herbert could not be trusted, could not get along with the brigade staff, or might be using too much firepower against civilian-populated areas.

There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID, September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim. We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, denied that Herbert ever mentioned war crimes.

DOUGLAS: *I can't believe that if there were war crimes involved and we were trying to stay out of it—as indicated by this passage [from* Soldier*] you*

just read to me—that we'd then recommend a full-scale investigation [into Herbert's relief], which we did.

WALLACE (to the audience): *Douglas said that he was irritated by the implication that he wouldn't bring charges against a general.*

DOUGLAS: *And I am annoyed, I'm hurt. I feel that this is an indication that I'm not of strong enough character to be either a lawyer or an Army officer, and I happen to be both, and I'm proud of being both.*

WALLACE: *But why haven't you said this up to now?*

DOUGLAS: *Nobody's asked me.*

Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.

According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent $8000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.

It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York *Times* piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'"

HERBERT: *I'm not going to say we have documents or not. I can say we have statements, sworn statements and testimony that will prove that I have reported war crimes in Vietnam.*

WALLACE: *Have you published them in your book?*

HERBERT: *I don't think so.*

WALLACE: *Why?*

HERBERT: *I had no reason to, it was already in the paper, other things. I don't know why. I have lawyers just like you have lawyers. We didn't put everything out that we have.*

Herbert claims that the Army's investigations into Barnes and Franklin were a whitewash. Since the Army, citing legal precedent, refused to release the investigations, there was no way to be absolutely certain Herbert was not correct.

Then Herbert put me in contact with Ken Rosenblum. As a captain in the Judge Advocate General's Corps, Rosenblum had done the nuts-and-bolts work during the Army's investigation of General Barnes. He had access to much of the material in the Franklin investigation as well.

"You should talk to him," Herbert told me. He added that he had already called Rosenblum on my behalf and that Rosenblum was now out of the Army and could talk freely. I was shaken. After all I had found out, I thought it inconceivable that Herbert was telling the truth. But if he was not, why put me in contact with Rosenblum?

I flew to Islip, Long Island, to talk with Rosenblum. He is a quiet-spoken, young assistant district attorney, and he assured me, quite calmly, that there had been no cover-up. "We spent hours taking statements from Herbert," he said. "And for several months I was Herbert's telephone buddy. He kept calling me up with additional suggestions of people to talk to. We went all over the country following his leads, chasing people down, but when it came to the critical facts, the people he had told us would support his claims just did not. You know, I think he has reached the point where he really believes his charges." Rosenblum is only one of several people, including Colonel Franklin, who deny Herbert's charges but feel that Herbert himself *believes* he is telling the truth. How else explain Herbert's volunteering the names of so many

individuals, such as Rosenblum, who rather than confirm his story actually undermine it?

Most of *Soldier* is a mélange, a kaleidoscope of truth, half-truth, and fabrication. A few examples:

—According to *Soldier,* in 1968, shortly after Herbert had come to the 173rd, three Americans were found staked out, tortured to death by North Vietnamese. A few days later three NVA soldiers were spotted staked out on the same spot. A note pinned to one of the bodies explained that the three had been executed by the NVA themselves as punishment for having tortured the Americans. According to Herbert, Major Walt Werner reported the incident exactly as it had occurred, but his battalion commander refused to accept it. "What the hell was Werner trying to do, he asked, credit the North Vietnamese Army with humane actions? . . . [Werner] was encouraged to alter his report. He refused—and that took guts." That, suggested Herbert, was the reason Werner had not received an assignment he had wanted in Vietnam.

"Somebody's imagination is running a little wild," Werner told me. "An incident like that did happen, but it was two years earlier at Khe Sanh. It was reported by myself and others without any problem. It had nothing to do with my not getting the job I wanted."

—Master Sergeant Roy Bumgarner, who served under Herbert, was charged with having murdered three Vietnamese peasants in cold blood, blown off their heads with a grenade, then produced several Chinese weapons which he claimed he found on their bodies to substantiate his story that they were enemy soldiers. Herbert ridicules the charges, and depicts himself defending a hapless Bumgarner's constitutional rights against badgering military investigators.

Herbert ends his account without mentioning that Bumgarner was ultimately court-martialed and found guilty on the basis of overwhelming evidence.

—Captain Jim Grimshaw, who served under Herbert in Vietnam, supposedly tried to flush some Viet Cong soldiers from a cave where they were hiding, without injuring some female civilians and children also in the cave. To do that, Grimshaw heroically crawled into the cave, emerged a couple of minutes later "carrying a baby in his arms. . . . The three Viet Cong soldiers and the two women followed closely behind. It was cool. Nobody asked him why he did it, he never explained. I submitted him for the Silver Star. . . . But he never received it."

When I phoned Grimshaw to ask him about that and other stories involving him, he denied that the incident had ever occurred. Nor, he said, had Herbert ever submitted him for a Silver Star. A few days later, I was surprised to receive a long letter from Grimshaw: "I thought Herbert was a fine commander and man," he wrote, "and I would do what I could to help him—anything, except lie."

—Even the General's duck. According to Herbert, General Barnes kept a duck as a mascot, sometimes ordering his men, only half-jokingly, to salute it. One night in a rage, Herbert supposedly killed it and had duck sandwiches a few hours later with Sergeant Major Bittorie.

Bittorie denies this, and the general who succeeded Barnes inherited the duck long after Herbert had left. When presented with this denial, Herbert first claimed that he had not meant to name Bittorie but another sergeant, and now denies that Bittorie's name was ever in the book regarding the duck incident. But it is—page 400.

We checked some tales in *Soldier* about Herbert's exploits prior to Vietnam. One after another, the stories he told were refuted by men who, usually, had no axes to grind.

Other yarns describe Herbert's James Bond-like activity in the Middle East—serving as a finger man for political assassins, and aborting a zany extortion-espionage plot involving British and American girls from sensitive posts in the Middle East who were photographed in compromising positions while bedded down in the Dominican Republic. All those stories met with incredulous denials by officials who had served with or over Herbert during that time.

Herbert recounts how, while serving in Europe with U.S. Rangers, he arranged for his men to receive special training from the famed Nazi commando, Otto Skorzeny, who had set up a "School of Commando Tactics" in the mountains of Spain. Skorzeny, after reading Herbert's account, says "everything is invented from A-Z."

One of the few reviewers to question Herbert's credibility discovered inaccuracies in his account of Korean experiences. S. L. A. Marshall wrote in the *National Review:* "As for where truth lies in this incident, and the reliability of Mr. Herbert's testament, if his recollection of what happened around Ankhe and Tuyhoa in Vietnam is no better than his recall of experience in Korea, the grading should be zero minus. Having been there at the same time, moving through the same scenes with the same outfits, I say that he dilates expansively on things that never happened."

Discrepancies had also turned up in Herbert's first book, *Conquest to Nowhere,* about the Korean War. Its co-author, Robert Niemann, had tried to check out some of Herbert's stories.

After answering some of Niemann's queries, a man known in the book as "Bernstein" wrote: "When I saw 'Herb' over the New Year I was appalled by how bad his memory has grown. He was very mixed up on many facts and points of information. I would advise you to check carefully any facts used in promotional work. Those things can backfire. In all confidence I knew 'Herb' better than anyone in the company and he was always

prone to exaggeration and looseness in this way. I say this as a friend who understands him and not in the least way to deprecate him. He's just that way."

When we tracked down "Bernstein" in New York, he confirmed having written the letter, on January 18, 1954.

In January, 1973, Herbert made yet another appearance, his third, on the Dick Cavett Show. It was like old home week. No sooner had Herbert sat down than he unveiled his newest claim: classified Pentagon documents, filched for him by a friend at the Pentagon, demonstrated that the Army had been out to ruin him by any available means. "It says in effect," he told Cavett, "that once the publicity dies down, we will get this guy."

In fact, the documents say nothing of the kind. Herbert had sent us a set weeks before. If anything, they show that the Army had decided to bring no legal or administrative action against Herbert, although some officers felt action was justified.

Cavett did not ask Herbert to produce the documents. In a follow-up story on those documents, a New York *Times* reporter included in his tentative lead the fact that "a careful examination of the copies of the documents obtained by the New York *Times* also reveals them to be less dramatic than Colonel Herbert's description of them on the Dick Cavett Show of January 23, which illuminates the ambiguities that have permeated the Herbert case for three years." An editor ordered that lead dropped on the grounds that it was opinion, not fact.

Our *Sixty Minutes* show on Herbert was aired in February. What was most surprising in the wake of it was the reaction of Holt, Rinehart and Winston, the publishers of *Soldier* (and, incidentally, a company owned by CBS). There was no reaction. Without divulging the tone of our report, I had spoken with Donald Hutter, the editor at Holt who was handling *Soldier*, a few days before we went on the air.

"Essentially," he had said, "this is a book about the military profession and a man dedicated to trying to awaken us to the corruption of that profession. I am privileged to be part of it."

After our show had been broadcast, I had thought that Holt would try to contact us, if only as a precaution against a libel suit. How serious were the flaws in Herbert's story? What else did we have on him? The book, after all, is replete with potentially actionable attacks against several military officers. But there was no call from Holt.

When I was preparing this piece, I called Holt. There were a number of pictures in the book and I thought it very likely that at least three of them were not what the captions purported. When I told Hutter why I was doubtful, he admitted: "I can't say I examined them that carefully. Tony gave them to us and they seem to be what he said they were. But I can't say they are categorically, myself.

"There is no question in our mind about the substantial validity of Tony's story."

The views of Aaron Asher, Holt vice-president, are much the same. "We are only responsible for a general feeling of accuracy," he says, "not to check out every detail."

What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.

It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur, before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it forgets the responsibility of the press. The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay. □

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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ANTHONY HERBERT, Plaintiff,	:	Civil Action File No. 74/434
-against-	:	
BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY, Defendants.	:	ANSWER (Judge Marvin E. Frankel)

----------x

Defendants Mike Wallace (hereinafter "Wallace") and Columbia Broadcasting System, Inc. (hereinafter "CBS") by Coudert Brothers, their attorneys, in answer to plaintiff's complaint respectfully allege:

AS AND FOR A FIRST DEFENSE

1. The complaint fails to state a claim upon which relief can be granted.

AS AND FOR A SECOND DEFENSE
(Answering the First Count)

2. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs "1" and "2" of plaintiff's complaint; except, with respect to paragraph "2" thereof, admit that at some time prior to his retirement, plaintiff brought charges against his immediate superior officers relative to a cover-up of atrocities during the Vietnam War.

3. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "3" of plaintiff's complaint; except admit that, as an employee of CBS, Lando served as the producer of a segment [entitled "The Selling of Colonel Herbert" (hereinafter "Selling")] of the CBS television program entitled "60 Minutes", said program having been broadcast over the CBS Television Network on February 4, 1973 from the City, County and State of New York.

4. Admit each and every allegation contained in paragraphs "4" and "5" of plaintiff's complaint.

5. Deny knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph "6" of plaintiff's complaint.

6. Deny each and every allegation contained in paragraph "7" of plaintiff's complaint; except admit that plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries for or on behalf of the United States Army, and enjoyed a good reputation for courage under fire, but deny knowledge or information sufficient to form a belief as to the allegation that plaintiff was selected by General M.B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.

7. Upon information and belief, deny each and every allegation contained in paragraph "8" of plaintiff's

complaint; except admit that plaintiff was relieved of command by his superior Brigade officer and that a poor efficiency rating placed against his record was subsequently removed by the Secretary of the Army.

8. Deny each and every allegation contained in paragraph "9" of plaintiff's complaint.

9. Deny each and every allegation contained in paragraph "10" of plaintiff's complaint; except admit that in September of 1970 plaintiff's charges of war crimes were made to the Third Army Inspector General at Fort McPherson, that said charges were referred to the U.S. Army Criminal Investigation Division (USACIDA) and that in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

10. Deny each and every allegation contained in paragraph "11" of plaintiff's complaint; except admit that in or about March of 1971, it became known beyond the military and Department of Defense that plaintiff was charging war crimes and command cover-up and that said charges and knowledge of said charges became a matter of wide public interest.

11. Upon information and belief, deny each and every allegation contained in paragraphs "12" and "13" of plaintiff's complaint; except admit upon information and belief that Barry Lando (hereinafter "Lando")first met plaintiff at Natural Bridge, Virginia on or about July 1, 1971.

12. Deny each and every allegation contained in paragraph "14" of plaintiff's complaint.

13. Deny each and every allegation contained in paragraph "15" of plaintiff's complaint; except admit that, at the time of the production, presentation and broadcast of "Selling" defendants Lando and Wallace were employees of defendant CBS.

14. Deny each and every allegation contained in paragraph "16" of plaintiff's complaint; except insofar as paragraph "3" of this answer contains specific admissions and further admit that the program "60 Minutes" was broadcast to millions of viewers.

15. Deny each and every allegation contained in paragraph "17" of plaintiff's complaint.

16. Deny each and every allegation contained in paragraph "18" of plaintiff's complaint including its sub-paragraphs; except admit that annexed to the plaintiff's complaint as Exhibit "A" is an audio transcript of "Selling".

17. Deny each and every allegation contained in paragraphs "19", "20", "21" and "23" of plaintiff's complaint.

18. Deny each and every allegation contained in paragraph "22" of plaintiff's complaint.

19. Deny each and every allegation contained in paragraph "24" of plaintiff's complaint; except admit that

statements attributed to Captain Heintz do appear in the audio transcript annexed to plaintiff's complaint as Exhibit "A".

20. Deny each and every allegation contained in paragraph "25" of plaintiff's complaint; except admit that "Selling" was presented for approximately thirty-five minutes and that, except for that portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York without the presence of any other person who appeared on the program.

21. Deny each and every allegation contained in paragraph "26" of plaintiff's complaint including the subparagraphs thereof; except admit that, in the presence of the executive producer of "60 Minutes", plaintiff accused defendant Lando of producing "Selling" out of sp because defendant Lando had not written the book on plaintiff; and defendant Lando responded thereto by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel.

22. Deny each and every allegation contained in paragraphs "27" and "28" of plaintiff's complaint.

23. Deny each and every allegation contained in paragraph "29" including the subparagraphs thereof; except as to subparagraph (a), admit that an interview with Major James Grimshaw was conducted in the Pentagon; and as to subparagraph (g) admit that "Selling" reported that numerous persons interviewed supported plaintiff's leadership as a Battalion Commander and some denied that plaintiff was a brutal or a ruthless killer.

24. Deny each and every allegation contained in paragraphs "30", "31", "32", "33" and "34" of plaintiff's complaint.

AS AND FOR A THIRD DEFENSE

25. The matter complained of was based on information communicated to defendants by reliable persons and from reliable sources and was believed by defendants to be true and a fair and accurate report of public and official proceedings. Said matter was published by defendants in good faith, without malice.

AS AND FOR A FOURTH DEFENSE

26. The publication charged to be defamatory is privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of the defendants under the United States Constitution.

WHEREFORE, defendants, Mike Wallace and Columbia Broadcasting System, Inc. pray for judgment dismissing plaintiff's complaint, together with costs and disbursements of this action.

Yours, etc.

COUDERT BROTHERS

By _____

A Member of the Firm
Attorneys for Defendants
Mike Wallace and Columbia
Broadcasting System, Inc.
Office and P.O. Address:
200 Park Avenue
New York, New York 10017
Telephone: (212) 973-3300

State of New York, County of NEW YORK ss:

PAUL B. JONES, being duly sworn, deposes and says:

I am over the age of 18 years and reside at 143 West 95th Street, New York, New York.

On the 15th day of March, 19 74, I served the within Answer upon Cohn, Glickstein, Lurie, Ostrin & Lubell, Esqs., Charles Rembar, Esq. and Richard G. Green, Esq., the attorney for the above named plaintiff and co-defendants, by depositing a true copy of the same securely enclosed in a post-paid wrapper in the Post Office —a Branch Post Office—Station—Sub-Station—Finance Station—Letter Box—Mail Chute—Official Depository maintained and exclusively controlled by the United States at 200 Park Avenue, New York, New York directed to said attorneys at (see below) that being the address designated by them for that purpose, or the place where they then kept an office, between which places there was then and now is regular communication by mail.

Paul B. Jones

Sworn to before me, this 15th day of March, 1974

Phyllis Kay Dryden

PHYLLIS KAY DRYDEN
Notary Public, State of New York
No. 4507810
Qualified in New York County
Commission Expires March 30, 1975

Addresses:
Cohn, Glickstein, Lurie, Ostrin & Lubell
1370 Avenue of the Americas, New York, N.Y.
Charles Rembar, Esq., Rembar, Wolf & Curtis
19 West 44th Street, New York, New York
Richard G. Green, Esq., 1270 Sixth Avenue
New York, New York 10020

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

ANTHONY HERBERT, :

Plaintiff, :

-against- :

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY, :

Defendants. :

- -X

Civil Action
File No. 74/434
(Judge Marvin E. Frankel)

ANSWER

Defendant, BARRY LANDO, by RICHARD G. GREEN, his attorney, for his answer to the complaint herein:

1) Denies each and every allegation contained in paragraphs 9, 13, 17, 19, 20, 23, 27, 28, 30, 31, 33, 34, 38, 39, 51, 52 and 53.

2) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 48 and 49.

3) Denies each and every allegation contained in paragraph 1 except the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

4) With respect to paragraph 2, denies knowledge or information sufficient to form a belief as to when plaintiff caused to be written a book entitled "SOLDIER."

5) Denies each and every allegation contained in paragraph 3, except that at all times hereinafter mentioned defendant Lando is and was an employee of defendant COLUMBIA BROADCASTING SYSTEM, INC. (misnamed in paragraph 3 of the

complaint COLUMBIA BROADCASTING SYSTEMS, INC.) in which capacity he produced a segment, entitled "THE SELLING OF COL. HERBERT" (hereinafter "Selling") of a program entitled "SIXTY MINUTES," which was broadcast on the CBS Television Network from its studio in New York City on February 4, 1973,and who, subsequent thereto, wrote and submitted to ATLANTIC MONTHLY COMPANY (hereinafter "Company") an article entitled "THE HERBERT AFFAIR" (hereinafter "Affair") which was published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine (hereinafter "Monthly").

6) Denies each and every allegation contained in paragraph 7 except plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries representing the United States Army and had a good reputation for courage under fire, and defendant Lando denies knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff was selected by Gen. Matthew B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.

7) Denies each and every allegation contained in paragraph 8 except plaintiff was relieved of command by his superior brigade officers and a poor efficiency rating was placed against his record which was subsequently removed by the Secretary of the Army upon review.

8) Denies each and every allegation contained in paragraph 10 except in September, 1970 plaintiff made charges to the Third Army Inspector General at Fort McPherson, and said charges were subsequently referred to the U. S. Army Criminal Investigation Division Agency (USACIDA), and in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

9) Denies each and every allegation contained in paragraph 11 except in or about March, 1971 it became known beyond the military and Department of Defense and it became a matter of wide public interest that plaintiff was charging war crimes and command cover-up.

10) Denies each and every allegation contained in paragraph 12 except defendant Lando first met plaintiff at Natural Bridge, Virginia in or about July 1, 1971.

11) Denies each and every allegation contained in paragraph 14.

12) Denies each and every allegation contained in paragraph 15 except defendants Lando and Wallace are and at the time of the production, presentation and broadcast of "Selling", were employees of defendant CBS.

13) Denies each and every allegation contained in paragraph 16 except "Selling" was produced by defendant Lando and was broadcast by defendant CBS on February 4, 1973 to millions of viewers.

14) Denies each and every allegation contained in paragraph 18 including all its subparagraphs except, an audio transcript of "Selling" as broadcast on CBS is annexed to the complaint as Exhibit "A".

15) Denies each and every allegation contained in paragraph 21.

16) Denies each and every allegation contained in paragraph 22.

17) Denies each and every allegation contained in paragraph 24 except defendant Lando interviewed Captain Richard Heintz, and statements attributed to Captain Heintz appeared in "Selling".

18) Denies each and every allegation contained in paragraph 25 except "Selling" was presented for approximately 35 minutes of air time and that except for the portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York by defendant Wallace without the presence of any other person who appeared on the program.

19) Denies each and every allegation contained in paragraph 26 including all its subparagraphs, except, as to subparagraph (e) defendant Lando, after the interview and outside the interview room, responded to plaintiff's accusation that defendant Lando produced the program out of spite because defendant Lando was not writing the book on plaintiff by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel; and as to subparagraph (f) the executive producer of SIXTY MINUTES was present at said interview.

20) Denies each and every allegation contained in paragraph 29 including all its subparagraphs, except, as to subparagraph (a) an interview of Major James Grimshaw was conducted in the Pentagon, in a smaller, less comfortable studio, than the environment of plaintiff's interview, with Army personnel in attendance; and as to subparagraph (g) "Selling" reported that numerous persons interviewed supported plaintiff's

leadership as a battalion commander and some denied that plaintiff was a brutal or a ruthless killer.

21) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 32 except denies defendant Lando's activities were malicious.

22) Repeats the answers hereinbefore made to each and every allegation repeated and realleged in paragraph 35 of the complaint.

23) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 36 except "Monthly" is a magazine of national circulation.

24) Denies each and every allegation contained in paragraph 37 except "Affair" was distributed by defendant "Company" in the May, 1973 issue of "Monthly", Volume 231, Number 5.

25) Denies each and every allegation contained in paragraph 40 except a copy of "Affair" as published in "Monthly" is annexed to the complaint as Exhibit "B" and defendant Lando wrote the article "Affair" except for the introductory first paragraph and defendant Lando did not draw or select the illustrations for the article.

26) Denies each and every allegation contained in paragraph 41 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 75, Exhibit "B" of the complaint, hereinafter "Ex. B."), but the quotation is not a complete paragraph, as indicated in the complaint, but is a part of a paragraph which reads in full:

> When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.
>
> (Emphasis above and hereinafter added to show material omitted from quotation in complaint)

; and denies defendant Lando maliciously omitted any facts in "Affair" and denies knowledge or information sufficient to form a belief as to the remainder of subparagraph (a); as to subparagraph (b) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is extracted from the middle of a paragraph which reads in full:

> The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges, kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him. Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine, or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the beginning of the paragraph which reads in full:

> It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York Times piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'"

; and as to subparagraph (d) the words quoted were used in "Affair" (p. 80, Ex. B) as quoted.

27) Denies each and every allegation contained in paragraph 42 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair", (p. 75 Ex. B) as quoted, and denies knowledge or information sufficient to form a belief as to whether the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; as to subparagraph (c) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; and as to subparagraph (e) the words quoted were used in "Affair" (p. 77, Ex. B), but the quotation is not a complete paragraph as indicated in the complaint, but comes from the middle of a longer paragraph which reads in full:

> We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14. The Army put us in contact with two officers who claimed they had flown with Franklin to Hawaii on February 9 and returned with him to Cam Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers admitted to disliking Herbert. We also

> contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Illikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since R&R is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.

28) Denies each and every allegation contained in paragraph 43 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 80 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, inasmuch as the paragraph quoted ends with the phrase "A few examples:" and then continues for a column and a half to cite examples; as to subparagraph (b) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (e) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (f) the words quoted were used in "Affair" (p. 76 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is from a paragraph which reads in full:

> After being off on other stories, I was back onto Herbert. Over the next few weeks, SIXTY MINUTES researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in SOLDIER. One after another refuted many of Herbert's claims.

; as to subparagraph (g) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is taken out of context, the first six words coming from one paragraph, the balance coming

from the succeeding paragraph, and the two paragraphs read in full:

> Since the first glowing report I had done on Herbert, I had gone to work as a producer for SIXTY MINUTES. One of the first things I did was to push for a story on Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reporters, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soldiers who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I WANTED to believe in Herbert and now I see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.
>
> That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the SIXTY MINUTES show on him was being postponed because we were now planning to devote the full hour to him -- his was such an important story -- rather than the usual fifteen-or-twenty-minute segment.

29) Denies each and every allegation contained in paragraph 44 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 78, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph, which reads in full:

> There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID, September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim. We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, denied that Herbert ever mentioned war crimes.

; as to subparagraph (b) the words quoted were used in "Affair" (p. 79, Ex. B), what appears to be a second paragraph in the complaint is not a paragraph but is part of the first paragraph, and the last paragraph is incomplete, the complete paragraphs reading in full:

> According to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent $8,000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.
>
> It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York TIMES piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'"

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the

paragraph which reads in full:

> Nowhere in the entire one hundred and sixty pages of transcript of the official inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.

; and as to subparagraph (e) the words quoted were used in "Affair" (p. 75, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

> The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation.' Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.

30) Denies each and every allegation contained in paragraph 45 except, the words quoted were used in "Affair" (p. 81, Ex. B) but the quotation that appears to follow the first quoted paragraph does not follow it, said quotation is not a complete paragraph and the complete paragraphs read in full:

> What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.
>
> The Army has not released the contents of

its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.

It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it forgets the responsibility of the press. The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay.

31) Denies each and every allegation contained in paragraph 46 except the words quoted in subparagraphs (a), (b) and (c) appear in "Affair" (pp. 76, 73 and 77, Ex. B) as quoted; and the words quoted in subparagraph (d) appear in "Affair" (p. 76, Ex. B), but what appears to be the first quoted paragraph is not the beginning of that paragraph, and what appears to be a second quoted paragraph is in fact part of the first quoted paragraph which reads in full:

By the time we were ready to interview Herbert (and others) for the Sixty Minutes show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism, but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel

> action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of SIXTY MINUTES)and todefile his true story.

32) Denies that the statements referred to in paragraph 47 were false and defamatory, and denies knowledge or information sufficient to form a belief as to each and every other allegation contained in paragraph 47, except admits "Company" published the introduction to "Affair" in the words set forth on the first page of Exhibit B.

33) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 50 except denies "Affair" was false and malicious and contained malicious content and intent.

AS AND FOR A FIRST COMPLETE DEFENSE TO EACH CAUSE OF ACTION

34) The complaint fails to state a cause of action upon which relief can be granted.

AS AND FOR A SECOND COMPLETE DEFENSE TO EACH CAUSE OF ACTION

35) The publications charged to be defamatory are privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of defendant Lando under the Constitution of the United States.

AS AND FOR A THIRD COMPLETE DEFENSE TO EACH CAUSE OF ACTION

36) The publications charged to be defamatory were based on information communicated to defendant Lando by reliable persons and from reliable sources and were believed by

defendant to be true and a fair and accurate report regarding the course and conduct of public and official proceedings, published by defendant Lando in good faith without malice, and said publications are therefore privileged.

AS AND FOR A FOURTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

37) Defendant Lando was privileged as to the contents of Exhibit B because it was necessary and appropriate to defend his reputation against statements concerning him which had been made by plaintiff.

WHEREFORE, defendant Lando respectfully prays that this Court enter a judgment dismissing the complaint and awarding defendant Lando his reasonable costs and disbursements, together with such other and further relief as the Court may deem just and proper.

Richard G. Green

RICHARD G. GREEN
Attorney for defendant
Barry Lando
Office & P.O. Address
1270 Avenue of the Americas
New York, N. Y. 10020
Tel. No. 212-246-8689

New York, N. Y.
March 15, 1974

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x

ANTHONY HERBERT,

Plaintiff,

-against-

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants.

----------x

Civil Action
File No. 74/434
(Judge Marvin E. Frankel)

AMENDED ANSWER OF DEFENDANT LANDO

Defendant, BARRY LANDO, by RICHARD G. GREEN, his attorney, for his amended answer to the complaint herein:

1) Denies each and every allegation contained in paragraphs 9, 13, 17, 19, 20, 23, 27, 28, 30, 31, 33, 34, 38 39, 51, 52 and 53.

2) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs 48 and 49.

3) Denies each and every allegation contained in paragraph 1 except the matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars.

4) With respect to paragraph 2, denies knowledge or information sufficient to form a belief as to when plaintiff caused to be written a book entitled "SOLDIER."

5) Denies each and every allegation contained in paragraph 3, except that at all times hereinafter mentioned defendant Lando is and was an employee of defendant COLUMBIA BROADCASTING SYSTEM, INC. (misnamed in paragraph 3 of the

complaint COLUMBIA BROADCASTING SYSTEMS, INC.) in which capacity he produced a segment, entitled "THE SELLING OF COL. HERBERT" (hereinafter "Selling") of a program entitled "SIXTY MINUTES " which was broadcast on the CBS Television Network from its studio in New York City on February 4, 1973, and who, subsequent thereto, wrote and submitted to ATLANTIC MONTHLY COMPANY (hereinafter "Company") an article entitled "THE HERBERT AFFAIR" (hereinafter "Affair") which was published in the May, 1973 issue of "THE ATLANTIC MONTHLY" magazine (hereinafter "Monthly").

6) Admits each and every allegation contained in paragraph 6 except denies upon information and belief that defendant "Company" is, or at the times mentioned in the complaint, was engaged in any business in the State of New York, including, without limitation, the publication, distribution or sale in New York State of "Monthly".

7) Denies each and every allegation contained in paragraph 7 except plaintiff enlisted in the United States Army at 17 years of age, rose in the ranks and toured the United States and foreign countries representing the United States Army and had a good reputation for courage under fire, and defendant Lando denies knowledge or information sufficient to form a belief as to the truth of the allegation that plaintiff was selected by Gen. Matthew B. Ridgeway in November, 1951 as the outstanding American soldier in Korea.

8) Denies each and every allegation contained in paragraph 8 except plaintiff was relieved of command by his superior brigade officers and a poor efficiency rating was placed against his record which was subsequently removed by the Secretary of the Army upon review.

9) Denies each and every allegation contained in paragraph 10 except in September, 1970 plaintiff made charges to the Third Army Inspector General at Fort McPherson and said

charges were subsequently referred to the U. S. Army Criminal Investigation Division Agency (USACIDA), and in or about March of 1971, plaintiff filed formal charges against General Barnes and Colonel Franklin.

10) Denies each and every allegation contained in paragraph 11 except in or about March, 1971 it became known beyond the military and Department of Defense and it became a matter of wide public interest that plaintiff was charging war crimes and command cover-up.

11) Denies each and every allegation contained in paragraph 12 except defendant Lando first met plaintiff at Natural Bridge, Virginia in or about July 1, 1971.

12) Denies each and every allegation contained in paragraph 14.

13) Denies each and every allegation contained in paragraph 15 except defendants Lando and Wallace are and at the time of the production, presentation and broadcast of "Selling", were employees of defendant CBS.

14) Denies each and every allegation contained in paragraph 16 except "Selling" was produced by defendant Lando and was broadcast by defendant CBS on February 4, 1973 to millions of viewers.

15) Denies each and every allegation contained in paragraph 18 including all its subparagraphs except, an audio transcript of "Selling" as broadcast on CBS is annexed to the complaint as Exhibit "A".

16) Denies each and every allegation contained in paragraph 21.

17) Denies each and every allegation contained in paragraph 22.

18) Denies each and every allegation contained in paragraph 24 except defendant Lando interviewed Captain Richard Heintz, and statements attributed to Captain Heintz appeared in "Selling".

19) Denies each and every allegation contained in paragraph 25 except "Selling" was presented for approximately 35 minutes of air time and that except for the portion of the interview during which both plaintiff and Major James Grimshaw were present, plaintiff was interviewed in New York by defendant Wallace without the presence of any other person who appeared on the program.

20) Denies each and every allegation contained in paragraph 26 including all its subparagraphs, except, as to subparagraph (e) defendant Lando, after the interview and outside the interview room, responded to plaintiff's accusation that defendant Lando produced the program out of spite because defendant Lando was not writing the book on plaintiff by stating that if plaintiff continued to make this kind of accusation, defendant Lando would "get" plaintiff by suing him for libel; and as to subparagraph (f) the executive producer of SIXTY MINUTES was present at said interview.

21) Denies each and every allegation contained in paragraph 29 including all its subparagraphs, except, as to subparagraph (a) an interview of Major James Grimshaw was conducted in the Pentagon, in a smaller, less comfortable studio, than the environment of plaintiff's interview, with Army personnel in attendance; and as to subparagraph (g) "Selling"

reported that numerous persons interviewed supported plaintiff's leadership as a battalion commander and some denied that plaintiff was a brutal or a ruthless killer.

22) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 32 except denies defendant Lando's activities were malicious.

23) Repeats the answers hereinbefore made to each and every allegation repeated and realleged in paragraph 35 of the complaint.

24) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 36 except "Monthly" is a magazine of national circulation.

25) Denies each and every allegation contained in paragraph 37 except "Affair" was published by defendant "Company" in the May, 1973 issue of "Monthly", Volume 231, Number 5.

26) Denies each and every allegation contained in paragraph 40 except a copy of "Affair" as published in "Monthly" is annexed to the complaint as Exhibit "B" and defendant Lando wrote the article "Affair" except for the introductory first paragraph and defendant Lando did not draw or select the illustrations for the article.

27) Denies each and every allegation contained in paragraph 41 including all its subparagraphs, except as to subparagraph (a) the words quoted were used in "Affair" (p. 75 Exhibit "B" of the complaint, hereinafter "Ex. B."), but the

quotation is not a complete paragraph, as indicated in the complaint, but is a part of a paragraph which reads in full:

> When Army investigators finally cleared General Barnes in October, 1971, the Army partially took the wraps off. Reporters who inquired about the case had interviews arranged for them with several officers who had known Herbert in the 173rd and disputed his charges. Many leveled accusations against Herbert, claiming he himself had treated enemy POW's brutally, had damaged at least one civilian hamlet, and had exaggerated or otherwise misrepresented body counts.
>
> (Emphasis above and hereinafter added to show material omitted from quotation in complaint)

; and denies defendant Lando maliciously omitted any facts in "Affair" and denies knowledge or information sufficient to form a belief as to the remainder of subparagraph (a); as to subparagraph (b) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is extracted from the middle of a paragraph which reads in full:

> The reason for that standoff was that most of the Army personnel who had been interviewed and had attacked Herbert were either interested parties such as General Barnes, or men who made damning charges about Herbert's character but had no direct knowledge of the specific charges that Herbert was making. Many other officers, who might have effectively challenged several of Herbert's charges, kept silent, either because they had respected him in Vietnam, or because they just did not want to tangle with him. Although many reporters now held strong doubts about Herbert's case, no newspaper, magazine or network felt compelled to give any investigator the necessary time to probe further and discover who was lying.

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B), but the quotation is not a complete paragraph,

as indicated in the complaint, but is only the beginning of the paragraph which reads in full:

> It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York Times piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'"

; and as to subparagraph (d) the words quoted were used in "Affair" (p. 80, Ex. B) as quoted.

28) Denies each and every allegation contained in paragraph 42 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair", (p. 75 Ex. B) as quoted, and denies knowledge or information sufficient to form a belief as to whether the Army refused to permit Franklin and Barnes to be examined by the same expert examiner who had tested plaintiff; as to subparagraph (c) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; and as to subparagraph (e) the words quoted were used in "Affair" (p. 77, Ex. B), but the quotation is not a complete paragraph as indicated in the complaint, but comes from the middle of a longer paragraph which reads in full:

> We double-checked Army records to make certain that the action involving the massacre had indeed taken place on February 14, The Army put us in contact with two officers who claimed they had flown with Franklin to Hawaii on February 9 and returned with him to Cam

> Ranh Bay on February 16. Hotel records in Hawaii showed that both officers had been there at the time they claimed. Still, there was doubt. Both officers admitted to disliking Herbert. We also contacted a former chopper pilot, now a civilian, who claimed he had picked Franklin up at Cam Ranh Bay when he returned, and it was after February 14. Franklin's bill from the Illikai Hotel in Honolulu had Colonel and Mrs. Franklin registered there from February 7 to February 14. What that meant, said Herbert, was that, since R&R is only five days, Franklin had arrived in Hawaii on the 7th, left on the 12th, which conceivably could have him back at headquarters by the evening of the 14th.

29) Denies each and every allegation contained in paragraph 43 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 80 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, inasmuch as the paragraph quoted ends with the phrase "A few examples:" and then continues for a column and a half to cite examples; as to subparagraph (b) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (d) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (e) the words quoted were used in "Affair" (p. 78, Ex. B) as quoted; as to subparagraph (f) the words quoted were used in "Affair" (p. 76 Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is from a paragraph which reads in full:

> After being off on other stories, I was back onto Herbert. Over the next few weeks, SIXTY MINUTES researcher Mark Frederiksen and I spoke with more than a hundred and twenty people who had known Herbert throughout his career. Some of them had been mentioned in SOLDIER. One after another refuted many of Herbert's claims.

; as to subparagraph (g) the words quoted were used in "Affair" (p. 76, Ex. B), but the quotation is taken out of context, the first six words coming from one paragraph, the balance coming from the succeeding paragraph, and the two paragraphs read in full:

> Since the first glowing report I had done on Herbert, I had gone to work as a producer for SIXTY MINUTES. One of the first things I did was to push for a story on Herbert. I was still convinced he was telling the truth and he had continued to assure me, and other reporters, that as soon as he retired in February, 1972, he would make available more documents to substantiate his case. When I flew to Atlanta in March, 1972, Herbert gave me transcripts of a number of telephone interviews with soliders who seemed to support his claims. He also put me in touch with other men, giving me name after name of people who, he confidently said, would back his stories. I WANTED to believe in Herbert and now I see that I minimized the many discrepancies in his stories. When I showed Mike Wallace some of the information I had gathered on Herbert, including some newspaper reports questioning his story, Wallace looked through the material and announced that he thought Herbert was lying. His comment made me the more intent on proving Herbert was telling the truth.
>
> That turned out to be difficult. When I started contacting the people to whom Herbert had directed me, they were, when pinned down, not able to substantiate Herbert's claims, not even on an off-the-record basis. Even as my doubts grew, Herbert kept furnishing new names, new facts, new explanations. Then, in April, I received a call from a mutual acquaintance who told me Herbert had claimed that the SIXTY MINUTES show on him was being postponed because we were now planning to devote the full hour to him -- his was such an important story -- rather than the usual fifteen-or-twenty-minute segment.

30) Denies each and every allegation contained in paragraph 44 including all its subparagraphs, except, as to subparagraph (a) the words quoted were used in "Affair" (p. 78, Ex. B), but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph, which reads in full:

> There is an inexplicable gap of almost eighteen months between the time Herbert was relieved, April 5, 1969, and the day he formally brought his war crime charges to the Army CID, September 28, 1970. Herbert claims he was constantly trying to get his charges investigated during that period, but he has no written evidence whatsoever to back up his claim. We contacted all the Army officers Herbert said he had tried to report war crimes to while in Saigon. Most recalled talking with Herbert about his request for a formal inquiry into his relief from command. But all, including Colonel John Douglas, the Army's top lawyer and judge in Vietnam, deniedtthat Herbert ever mentioned war crimes.

; as to subparagraph (b) the words quoted were used in "Affair"" (p. 79, Ex. B), but what appears to be a second paragraph in the complaint is not a paragraph but is part of the first paragraph, and the last paragraph is incomplete, the complete paragraphs reading in full:

> Accodding to Herbert, during the several months he spent at Fort Leavenworth, Kansas, after leaving Vietnam, he worked ceaselessly, spent $8,000 of his own money, getting statements, contacting witnesses, all to buttress his war crimes case. Herbert does have several statements from officers praising him as a commander, which he used to appeal the damaging efficiency report in his record; but there is not a word relating to war crimes.
>
> It was only after Herbert had been transferred to Fort McPherson, Georgia, where the My Lai trials were in full swing, that there is any solid indication he was thinking about reporting war crimes. And it may well be that in bringing those charges, Herbert was as concerned with covering himself as with attacking Franklin and Barnes. Jim Wooten wrote in his Sunday New York TIMES piece on Herbert: "He began to discuss his experience with some Army lawyers at Fort McPherson. 'They kept recommending that I'd better make sure those things I'd seen were investigated,' he said. 'It made sense to me to try to follow the book on this and clear myself.'"

; as to subparagraph (c) the words quoted were used in "Affair" (p. 79, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the

paragraph which reads in full:

> Nowhere in the entire one hundred and sixty pages of transcript of the offical inquiry into Herbert's relief is there any mention by Herbert of war crimes. Why? Herbert first claimed that Army regulations prevented him from including war crime charges in his appeal. Army regulations say nothing of the kind. Herbert then claimed he did try to raise the charges during his appeal, but was advised not to by General Joseph Russ, the presiding officer. General Russ denies this. So do the court recorder and the military lawyer assigned to Herbert's case.

; and as to subparagraph (e) the words quoted were used in "Affair" (p. 75, Ex. B) but the quotation is not a complete paragraph, as indicated in the complaint, but is only the first part of the paragraph which reads in full:

> The Army also produced an official 'fact sheet' disputing Herbert's claims point by point. According to the Army, of the twenty-one allegations made by Herbert to the CID, only seven 'had sufficient substance to warrant action or further investigation.' Of those, three had already been investigated in Vietnam and one was a case that was not under U.S. jurisdiction. As for the remaining three incidents, including the February 14 killings, the Army claimed there was no evidence other than Herbert's own word, that he had actually reported those cases to Franklin and Barnes.

31) Denies each and every allegation contained in paragraph 45 except, the words quoted were used in "Affair" (p. 81, Ex. B)but the quotation that appears to follow the first quoted paragraph does not follow it, said quotation is not a complete paragraph and the complete paragraphs read in full:

> What to conclude? I don't pretend to know the motives behind the behavior that has brought Herbert to national prominence. It seems plain to me that they included a desire to salvage his threatened career and to seek revenge on Colonel Franklin and General Barnes, and that to do so he exploited the issue of war crimes.

> The Army has not released the contents of its investigation into the Herbert affair. The Army is not compelled to do so. There is no recent precedent for such disclosure, though it would presumably go a long way toward clearing the air. The Army, however, may well resist publishing the information because it would include many accounts of atrocities that would further damage the Army's own reputation.
>
> It is important not to let the vagaries of the Herbert affair obscure the fact that atrocities did occur before Herbert's eyes and the eyes of countless others. Indeed, the argument can be made that Herbert, whatever his distortions and inventions, is to be thanked for keeping the nation's eyes on the war crimes issue. But I am not comfortable with that argument, because it forgets the responsibility of the press. The press, which long had been negligent about dealing with the question of American war crimes, found in Herbert a heroic figure, a martyr through whom to dramatize the issue. But we bought ourselves a martyr with feet of clay.

32) Denies each and every allegation contained in paragraph 46 except the words quoted in subparagraphs (a), (b) and (c) appear in "Affair" (pp. 76, 73 and 77, Ex. B) as quoted; and the words quoted in subparagraph (d) appear in "Affair" (p. 76, Ex. B), but what appears to be the first quoted paragraph is not the beginning of that paragraph, and what appears to be a second quoted paragraph is in fact part of the first quoted paragraph which reads in full:

> By the time we were ready to interview Herbert (and others) for the Sixty Minutes show, the story had of course turned into something far different from the admiring profile I had thought would result. As soon as Mike Wallace's TV interview with him was filmed, Colonel Herbert turned on me, in his eyes an admirer now turned enemy, and challenged me to deny that I had originally wanted to write a book about him. I was startled; of course that was true, but I had almost forgotten it. In fact, my interest in collaborating with him had ended even before I developed doubts about his story. Herbert kept pressing the point, intimating that all along I had been engaged not in journalism, but a vendetta. Angered, I told him that if he went on in this way I would "get" him, that I had recourse to libel ...

action. I came to regret that outburst, because subsequently Colonel Herbert was to cite this confrontation as proof that the CBS television show was a willful plot on my part to discredit him (an impossibility, since others have the last say about the content and purposes of SIXTY MINUTES) and to defile his true story.

33) Denies that the statements referred to in paragraph 47 were false and defamatory, and denies knowledge or information sufficient to form a belief as to each and every other allegation contained in paragraph 47, except admits "Company" published the introduction to "Affair" in the words set forth on the first page of Exhibit B.

34) Denies knowledge or information sufficient to form a belief as to each and every allegation contained in paragraph 50 except denies "Affair" was false and malicious and contained malicious content and intent.

AS AND FOR A FIRST COMPLETE DEFENSE TO EACH CAUSE OF ACTION

35) The complaint fails to state a cause of action upon which relief can be granted.

AS AND FOR A SECOND COMPLETE DEFENSE TO EACH CAUSE OF ACTION

36) The publications charged to be defamatory are privileged under the First and Fourteenth Amendments to the Constitution of the United States and maintenance of this action would therefore violate the rights of defendant Lando under the Constitution of the United States.

AS AND FOR A THIRD COMPLETE DEFENSE TO EACH CAUSE OF ACTION

37) The publications charged to be defamatory were based on information communicated to defendant Lando by reliable persons and from reliable sources and were believed by

defendant to be true and a fair and accurate report regarding the course and conduct of public and official proceedings, published by defendant Lando in good faith without malice, and said publications are therefore privileged.

AS AND FOR A FOURTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

38) Defendant Lando was privileged as to the contents of Exhibit B because it was necessary and appropriate to defend his reputation against statements concerning him which had been made by plaintiff.

AS AND FOR A FIFTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

39) Defendant Company is a Massachusetts corporation. Upon information and belief Company does not have any offices or employees in the State of New York, does not conduct and has not conducted any business in the State of New York, and has not been authorized to do so.

40) Defendant Lando is a Canadian citizen who resides in the State of Maryland. The agreement for "Affair" between defendants Company and Lando was entered into outside New York, the correspondence between defendants Company and Lando was engaged in outside New York and "Affair" was written by Lando wholly without New York State. Lando did not transact any business in New York which gave rise to the second cause of action. The Court therefore lacks in personam jurisdiction over defendant Lando.

AS AND FOR A SIXTH COMPLETE DEFENSE TO THE SECOND CAUSE OF ACTION

41) Defendant Lando repeats and realleges each and every allegation contained in paragraph 39 hereinabove.

42) Plaintiff is a citizen of and resident of the State of Georgia.

43) Defendant Lando is a Canadian citizen and a resident of the State of Maryland.

44) Plaintiff's alleged second cause of action contained in the Complaint did not arise in the State of New York.

45) The Southern District of New York is therefore not a proper venue for this cause of action.

WHEREFORE, defendant Lando respectfully prays that this Court enter a judgment dismissing the complaint and awarding defendant Lando his reasonable costs and disbursements, together with such other and further relief as the Court may deem just and proper.

Richard G. Green

New York, New York
March 29, 1974.

RICHARD G. GREEN
Attorney for Defendant
Barry Lando
Office & P. O. Address
1270 Avenue of the Americas
New York, New York 10020
Tel. No. (212) 246-8689

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

LAURA KING, being duly sworn, deposes and says that she is over 21 years of age, is not a party to the action and resides at 310 East 55th Street, New York, New York.

That on the 29th day of March, 1974, she served the attached Amended Answer on each of the below listed attorneys by depositing a true copy of the same securely enclosed in a post-paid properly addressed wrapper in an official depository under the exclusive care and custody of the United States Post Office Department at 1270 Avenue of the Americas, New York, New York, ~~New York~~, and directed to them at the address designated by them for that purpose:

Cohn, Clickstein, Lurie,
Ostrin & Lubell
1370 Avenue of the Americas
New York, N. Y. 10019

Attorneys for Plaintiff

Coudert Brothers
200 Park Avenue
New York, New York 10017

Attorneys for Defendants Mike Wallace and Columbia Broadcasting System, Inc.

Rembar, Wolf & Curtis
19 West 44th Street
New York, New York 10036

Attorneys for Defendant Atlantic Monthly Company.

Sworn to before me this
29th day of March, 1974.

S/ LAURA KING
Laura King

ADRIA S. HILLMAN
Notary Public, State of New York
No. 31-6901851
Qualified in New York County
Commission Expires March 30, 1974

LAW OFFICES

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

1370 AVENUE OF THE AMERICAS

NEW YORK, N. Y. 10019

LOUIS D. BOUDIN (1908-1952)
SIDNEY ELLIOTT COHN
STEPHEN L. FINE
NEAL I. GANTCHER
LAURENCE R. KRUTECK
DAVID G. LUBELL
JONATHAN W. LUBELL
JEROME D. LURIE
MARY S. O'MELVENY
H. HOWARD OSTRIN
PHILIP D. TOBIN

ANTHONY J. DISTINTI, JR.
AUDREY J. ISAACS*
NEIL D. LIPTON
BARBARA S. MEHLSACK
ROBERT W. PARTNOY
ELLIOTT D. SHRIFTMAN
JEAN TAYLOR

*NEW JERSEY BAR ONLY

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IRVING MOROSS
OF COUNSEL

BY HAND

June 22, 1976

Carleton G. Eldridge, Jr., Esq.
Coudert Brothers
200 Park Avenue
New York, New York 10017

Re: Herbert v. Lando, et al.
74 Civ. 434 (CSH)

Dear Carl:

Pursuant to Judge Haight's request that the parties exchange their views concerning disputed areas of discovery, please be advised that the following items will be the subject of plaintiff's Rule 37 motion directed to defendants CBS and Wallace:

(1) questions about or document relating to the usual custom and practices of CBS concerning the production and present tion of "60 Minutes" segments;

(2) questions concerning conclusions formed by Wallace and/or employees of CBS as to the veracity of witnesses interviewed for or in connection with the "60 Minutes" segment on Col. Herbert;

(3) questions about or documents relating to conversations or communications between Wallace and/or employees of CBS and representatives of the Nixon White House staff concerning (a) Col. Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular;

(4) questions concerning conversations between Wallace and representatives of the Pentagon about Col. Herbert and/or his charges as to which you have claimed journalist's privilege;

(5) questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973;

(6) questions about or documents relating to expenses incurred by CBS or any agent, employee or representative thereof in preparing and presenting the "60 Minutes" segment on Col. Herbert;

(7) a document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum;

(8) documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the "60 Minutes" segment, or (e) events set forth in Soldier;

(9) documents relating to correspondence or communications between Wallace and/or employees of CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of Soldier, (c) Holt Rinehart & Winston, publisher of Soldier, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon;

(10) internal or inter-office CBS memoranda or correspondence prepared between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U.S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up;

(11) documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with Soldier;

(12) questions about or documents relating to conversations or communications by Wallace and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon.

With regard to items numbered (3), (8), (9), (10) and (12), we note that defendants have ~~produced~~ documents and answered some questions pertaining to materials specifically acquired or made, or conversations held, in the course of the preparation and publication of the "60 Minutes" segment. However, we believe that the existence of such documents in defendants' possession, or the facts surrounding such conversations by defendants, have a direct bearing upon defendants' intentions and upon the issue of recklessness and malice, and are thus discoverable.

With the exception of the memoranda described in (7) which CBS has declined to produce on grounds of attorney-client privilege, we know of no areas in dispute concerning communications between Wallace and/or CBS and counsel.

Many of the areas in dispute concern defendants' response to plaintiff's First Rule 34 Request. We summarized our position on your response in our letter of July 25, 1974. We have attempted to group many of those items together in this letter to avoid undue repetition; some of these matters seem particularly appropriate for resolution in advance of our conference with Judge Haight and a formal motion.

The pages from the Wallace, Hewitt & Leonard depositions which contain references to these disputed areas include the following: Wallace - 132-137, 165-167, 225-228, 275-282, 327-328, 349-351; Hewitt - 107-113, 124A-126, 138-139, 140-141, 147-148, 154-157; Leonard - 19-22, 89-92. CBS' position that item number (7) will not be produced is set forth at pp. 977-978 of the Lando deposition.

If it is possible to arrange for an informal conference before July 6, we will be happy to sit down with you to try to resolve as many areas as possible. The most convenient dates for us for such a meeting are Friday, June 25 in the

morning or after 3:00 P.M. or Friday, July 2, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

Mary K. O'Melveny

Mary K. O'Melveny

MKO'M:llc

cc: Honorable Charles S. Haight, Jr.
United States District Judge
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IRVING MOROSS
OF COUNSEL

BY HAND

June 22, 1976

Richard G. Green, Esq.
Green & Hillman
1270 Avenue of the Americas
New York, New York 10020

Re: Herbert v. Lando, et al.
74 Civ. 434 (CSH)

Dear Dick:

Pursuant to Judge Haight's request that the parties exchange their views concerning disputed areas of discovery, please be advised that the following items will be the subject of plaintiff's Rule 37 motion directed to defendant Barry Lando:

(1) questions concerning matters which Barry Lando proposed or discussed including in, or excluding from, the "60 Minutes" segment on Col. Herbert;

(2) questions concerning Lando's belief or intent as a basis for including in, or excluding from, the "60 Minutes" segment or the Atlantic article reference to specific matters, facts and events;

(3) questions concerning matters which Lando considered, or was interested in, mentioning on the "60 Minutes" segment;

(4) questions about or documents relating to (a) Lando's general custom and practices as an employee of CBS and/or the "60 Minutes" program, (b) his custom and practice in connection with the "60 Minutes" segment on Col. Herbert, and/or (c) CBS' general custom and practices in connection with

"60 Minutes."

(5) questions concerning Lando's knowledge and understanding about what constituted a war crime;

(6) questions concerning Lando's opinions and conclusions concerning the truth and accuracy of persons interviewed, appearing on or referred to in connection with the "60 Minutes" segment or the Atlantic Monthly article;

(7) questions concerning conclusions reached by Lando about specific events referred or related to the "60 Minutes" segment or the Atlantic Monthly article;

(8) questions concerning the basis for Lando's conclusions regarding people or leads to be pursued, or not to be pursued, in connection with the "60 Minutes" segment and the Atlantic Monthly article;

(9) questions concerning Lando's intentions and/or state of mind about Col. Herbert;

(10) questions about or documents relating to conversations or communications between Lando and representatives of the Nixon Administration or White House staff concerning (a) Col. Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular;

(11) questions about or documents relating to expenses incurred by Lando, CBS or any agent, employee or representative thereof in preparing and presenting the "60 Minutes" segment on Col. Herbert;

(12) questions concerning the document identified by Barry Lando as a CBS memorandum on the subject matter of a request to Lando from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert;

(13) documents in the possession of Lando or CBS during the period from June, 1971 to May, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the "60 Minutes" segment, or (e) events set forth in Soldier;

(14) documents relating to correspondence or communications between Lando and/or CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of Soldier, (c) Holt Rinehart & Winston, publisher of Soldier, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon;

(15) documents and questions concerning communications between Lando and the Department of Army, Department of Defense or Central Intelligence Agency on the subject of (a) Herbert, (b) officers or enlisted men assigned to the 173d Airborne Brigade in 1968 and 1969, (c) activities of the 173d Airborne Brigade in 1968 and 1969, (d) the preparation and publication of the "60 Minutes" segment on Herbert or the Atlantic Monthly article, and (e) Soldier.

(16) questions about and documents reflecting communications betwenn Lando or CBS between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U.S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up;

(17) questions about or documents relating to conversations or communications by Lando and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the "60 Minutes" segment or any individual appearing or quoted thereon.

(18) questions concerning conversations between Lando and CBS between February 4, 1973 and May, 1973 about the Atlantic Monthly article;

(19) questions concerning conversations between Lando and anyone concerning his proposed article on Col. Herbert prior to its publication by Atlantic;

(20) questions concerning conversations between Lando and Atlantic Monthly regarding the contents of the article on Col. Herbert following its publication.

With the exception of the memoranda described in (7) which CBS has declined to produce on grounds of attorney-client privilege, we know of no areas in dispute concerning communications between Lando and/or CBS and counsel.

With regard to items numbered (10), (13), (14), (15) and (16), we note that defendant has produced documents and answered questions pertaining to materials or conversations specifically acquired, made for or held in the course of the preparation or publication of the "60 Minutes" segment or the Atlantic Monthly article. However, we believe that the existence of such documents in defendant's possession or facts of such conversations by defendant have a direct bearing upon defendant's intentions and upon the issue of recklessness and malice and are thus discoverable.

Many of the areas in dispute concern defendant's response to plaintiff's First Rule 34 Request. We summarized our position on your response in our letter of July 23, 1974. We have attempted to group many of those items together in this letter to avoid undue repetition; some of these matters seem particularly appropriate for resolution in advance of our conference with Judge Haight and a formal motion.

The directions to Lando not to answer questions in these various areas appear at the following transcript pages of the Lando deposition: 173-177, 418-422, 503-506, 522-528, 579-580, 586-587, 666-668, 773-774, 807, 840-842, 876-882, 921-922, cf. 977-978, 1094-1098, 1138-1139, 1147-1149, 1331-1332, 1452, 1485-1491, 1524-1526, 1526-1531, 1554-1555, 1567-1571, 1610-1611, 1618, 1629-1630, 1716-1717, 1741-1746, 1747-1748, 1753-1757, 1789-1791, 1791-1792, 1841-1842, 1872-1882, 1890-1892, 1900-1901, 1905-1908, 1909-1911, 1925-1926, 1943-1946, 1953-1955, 2013-2015, 2021-2029, 2063-2064, 2071-2072, 2085-2086, 2112, 2158, 2175-2176, 2178-2180, 2182-2183, 2286-2287, 2301-2304, 2311-2313, 2341-2342A, 2391-2393, 2453-2454, 2480, 2505-2506, 2556-2558, 2570-2573, 2577-2579, 2583-2586, 2594, 2658-2660, 2685 and 2694.

If it is possible to arrange for an informal conference before July 6, we will be happy to sit down with you to try to resolve as many areas as possible. The most convenient dates for us for such a meeting are Friday, June 25 in the morning or after 3:00 P.M. or Friday, July 2, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

Mary K. O'Melveny

Mary K. O'Melveny

MKO'M:llc

cc: Honorable Charles S. Haight, Jr.
United States District Judge
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RIO DE JANEIRO, R. J.

July 1, 1976

Mary K. O'Melveny, Esq.
Cohn, Glickstein, Jurie,
Ostrin & Lubell
1370 Avenue of the Americas
New York, New York 10019

Re: Herbert v. CBS, et al.
74 Civ. 434 (CSH)

Dear Mary:

In response to your letter of June 22, 1976 outlining the areas of discovery with respect to which plaintiff is pursuing Rule 37 relief, I am writing on behalf of defendants Mike Wallace and CBS to set forth the following views:

While each of the twelve numbered paragraphs in your letter identify your characterization of disputed areas in discovery and while you also list generally the contested questions upon oral examination of Messrs. Leonard, Hewitt and Wallace, you have not identified under each of your categories the specific questions which drew objections. Upon our review of the transcripts, we have made an attempt to isolate the questions which may relate in substance to those categories. The text of each objectionable question is set forth with corresponding transcript page and line reference under each of your numbered categories in the memorandum accompanying this letter. Here, we draw your attention to your numbered areas of dispute, the page and line reference to questions which drew an objection and our stated grounds for objection to questions and, where necessary, to your requests for production of documents.

PLAINTIFF'S PARAGRAPH (1): "Questions about or documents relating to the usual custom and practices of CBS concerning the production and presentation of '60 Minutes' segments."

HEWITT:

Page 124(a), line 18
Page 140, line 8
Page 140, line 23

Page 141, line 7
Page 141, line 17

LEONARD: No questions.

WALLACE:

Page 279, line 15.

BASIS OF OBJECTION: Defendants Mike Wallace and CBS object to the questions listed above on the grounds that information relating to general CBS policies are entirely irrelevant to the issues raised by the pleadings and therefore are not likely to lead to the discovery of admissible evidence. Whether CBS had any policy, whether investigative reporters adhered to or departed from some policy, whether CBS was in the practice of conducting a dozen filmed interviews or one filmed interview of the same person, are all questions which have no bearing upon any issue raised by the pleadings. There is no dispute but that in this case, plaintiff's libel claim is governed by New York Times v. Sullivan and its progeny. Accordingly, it is settled that the dispositive issues turn upon plaintiff's clear and convincing proof of falsity and knowledge of falsity of reported fact. None of those questions listed above are calculated to lead to the discovery of admissible evidence on those issues.

PLAINTIFF'S PARAGRAPH (2): "Questions concerning conclusions formed by Wallace and/or employees of CBS as to the veracity of witnesses interviewed for or in connection with the '60 Minutes' segment on Colonel Herbert."

LEONARD: No questions.

WALLACE: No questions.

HEWITT:

Page 151, line 24.

BASIS OF OBJECTION: The primary basis of the objection to the question appearing at page 151, line 24 of the Hewitt deposition is that, inasmuch as Mr. Hewitt had not testified to knowledge and, in fact, did not know the identity of specific individuals interviewed who were at the "POW compound in Vietnam", the question is lacking in foundation and, in its form is impossible to answer.

As an additional ground, defendant CBS contends that in no event is this category of question relevant to the issues raised by the pleadings; or likely to lead to the discovery of admissible evidence. For elaboration, your attention is directed to our view of the application of the Sullivan rule as the basis of the objection to those questions set forth above in connection with your paragraph (1).

PLAINTIFF'S PARAGRAPH (3): "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS and representatives of the Nixon White House Staff concerning (a) Colonel Herbert, (b) CBS' coverage of the war in Vietnam, (c) CBS' coverage of war crimes, or (d) bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular."

LEONARD:

Pages 87-89

WALLACE:

Pages 132, line 3 through 133, line 19

HEWITT:

Colloquy between counsel at pages 154, lines 23 through 156, line 6

BASIS OF OBJECTION: Upon our review of relevant transcripts, we find that no question relating to paragraph 3(a) drew an objection which resulted in a direction not to answer. With respect to paragraph 3(b), 3(c) and 3(d) defendants Mike Wallace and CBS object on the grounds that under no theory can it be argued that questions relating generally to CBS' coverage of the war in Vietnam, CBS' coverage of war crimes or bias on the part of the Nixon Administration or White House staff against the news media in general or CBS in particular can yield any evidence relevant to said requisite proof of falsity and knowledge of falsity of any material fact included in either the CBS broadcast or any material fact in the voluminous file of documents produced by defendants in this case.

PLAINTIFF'S PARAGRAPH (4): "Questions concerning conversations between Wallace and representatives of the Pentagon about Col. Herbert and/or his charges as to which you have claimed journalist's privilege";

LEONARD: No questions.

HEWITT: No questions.

WALLACE:

Page 226, line 5.

This is a claim of a journalists's privilege under Civil Rights Law Sec. 79-h and under the First Amendment to the United States Constitution as well as under Article I, Section 8 of the New York State Constitution.

PLAINTIFF'S PARAGRAPH (5): "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973."

LEONARD: No questions.

HEWITT: No questions.

WALLACE: No questions.

BASIS OF OBJECTION TO PRODUCTION OF DOCUMENTS: All documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of "Selling" have been produced. To the extent this production request seeks documents which may have been generated or acquired by Mike Wallace and/or CBS subsequent to the date of the broadcast, defendants object to production on the grounds that the First Amendment Constitutional Privilege limits relevant inquiry to facts known to the persons responsible for the publication at the time of the broadcast. Such documents as may have been acquired or generated after the broadcast are irrelevant to the facts known at the time of the broadcast and therefore cannot lead to the discovery of admissible evidence. Without waiving the objection, we advise that, apart from documents requested by counsel or acquired by counsel, defendants are not aware at this time of any additional documents relevant to the request set forth in plaintiff's paragraph (5).

PLAINTIFF'S PARAGRAPH (6): "Questions about or documents relating to expenses incurred by CBS or any agent, employee or representative thereof in preparing and presenting the '60 Minutes' segment on Col. Herbert";

LEONARD:

Page 22, line 4

HEWITT:

Page 138, line 6

Page 156, line 9 - 25 (relevant colloquy of counsel)

WALLACE: No questions.

BASIS OF OBJECTION TO QUESTION AND TO PRODUCTION OF DOCUMENTS: No documents reflecting the expenses incurred by defendants Mike Wallace and CBS in connection with the research, preparation and broadcast of "Selling" have been produced since it is the defendants' position that such requests and questions pertinent thereto are wholly irrelevant to the issues involved in the present litigation, are not calculated to lead to the discovery of admissible evidence and that they are burdensome and oppressive, particularly since -- as stated by Mr. Hewitt during his deposition -- such materials are not retained and filed by particular program segment such as "Selling" (pp. 137-8).

PLAINTIFF'S PARAGRAPH (7): "A document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum";

HEWITT:

Page 109, line 18

LEONARD: No questions.

WALLACE: No questions.

BASIS OF OBJECTIONS: The document in question has not been produced by defendant CBS because the contents thereof reflect advice from attorney to client. The question listed above is objectionable on the grounds that the answer to the question as framed, calls for testimony about confidential communications between attorney and client.

PLAINTIFF'S PARAGRAPH (8): "Documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the '60 Minutes' segment, or (e) events set forth in Soldier;"

See objection made in response to plaintiff's paragraph (5).

PLAINTIFF'S PARAGRAPH (9): "Documents relating to correspondence or communications between Wallace and/or employees of CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of Soldier, (c) Holt Rinehart & Winston, publisher of Soldier, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon;".

All documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of "Selling" have been produced.

PLAINTIFF'S PARAGRAPH (10): "Internal or inter-office CBS memoranda or correspondence prepared between June, 1971 and May, 1973 concerning (a) coverage of the Vietnam War and conduct of U.S. military personnel, (b) alleged anti-war bias on the part of the news media in general or CBS in particular, (c) pressure from the Nixon Administration or White House staff on the media, (d) coverage of war crimes and/or allegations concerning their concealment or cover-up";

BASIS OF OBJECTION: All documents in the possession of Mike Wallace and CBS acquired or prepared in connection with the research, preparation and broadcast of "Selling" have been produced. To the extent plaintiff's request goes beyond

those documents, defendants have objected to production and continue to object on the grounds that, even if such documents did exist, they are irrelevant to the activities of CBS employees involved in the production and broadcast of "selling", are irrelevant to the publications sued upon in this action and therefore are not likely to lead to the discovery of admissible evidence.

PLAINTIFF'S PARAGRAPH (11): "Documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with Soldier;"

BASIS OF OBJECTION: Defendant CBS will produce correspondence, memoranda and telephone logs, if any exist, relating to or concerning the payments of royalties or advances against royalties; but to the extent that plaintiff requests other documents, particularly those relating to accounting procedures and royalty statements, defendant objects on the grounds that such documents are irrelevant to the issues involved in the present litigation and not likely to lead to the discovery of admissible evidence, that defendant CBS is not required by the F.R.C.P. to produce documents which are not within its possession, custody or control and on the further ground that the production of such documents is burdensome and oppressive.

PLAINTIFF'S PARAGRAPH (12): "Questions about or documents relating to conversation or communications by Wallace and/or employees of CBS with or to anyone at any time, including post-litigation, concerning (a) Col. Herbert, (b) his charges, and/or (c) the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon."

HEWITT:

Page 147, line 3

Page 147, line 25

Page 148, line 8

WALLACE:

Page 166, line 4)
Page 166, line 10) Objection withdrawn. Wallace will fill in the answers prior to execution of the transcript.

LEONARD: No questions.

BASIS OF OBJECTION TO QUESTIONS AND PRODUCTION OF DOCUMENTS: First, the question put to Mr. Hewitt drew objection because the interrogator failed to identify the specific conversations he had in mind after 147 or 148 pages of testimony had been given by the witness. Furthermore, the witness was not permitted to review all of the prior testimony relevant thereto. With respect to the category and the request for production of documents post-broadcast and post-litigation, defendants object on the grounds that such questions and documentation are irrelevant to the issues raised by the pleadings for the reasons stated above and therefore are not calculated to lead to the discovery of admissible evidence.

The foregoing constitutes the summarization of the views of defendants Mike Wallace and CBS concerning the disputed areas of discovery outlined in your letter of June 22, 1976. We trust that it will aid in advancing your understanding of defendants' position with respect to specific objections and look forward to discussing these matters further during our July 2, 1976 meeting.

Very truly yours,

COUDERT BROTHERS

By _____
A Member of the Firm
Attorneys for Defendants
Mike Wallace and CBS Inc.

cc: Hon. Charles S. Haight, Jr.
W. Mallory Rintoul, Esq.
Richard G. Green, Esq.
Charles Rembar, Esq.

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RICHARD O. GREEN
ADRIA S. HILLMAN

BY HAND

July 1, 1976

Ms. Mary K. O'Melveny
Cohn, Glickstein, Lurie, Ostrin & Lubell
1370 Avenue of the Americas
New York, New York 10019

Re: Herbert v. Lando et al.

Dear Mary:

We refer to your letter of June 22, 1976 and to Judge Haight's request that the parties exchange their views concerning disputed areas of plaintiff's discovery.

While you enumerated in your letter disputed discovery items which plaintiff intends to pursue in his proposed Rule 37 motion, plaintiff has not designated the questions which fall into those areas, nor are any reasons stated why discovery should be allowed in those areas. Trying to work from page references on page 4 of your letter, we are unable to discern which questions fall into which category. It is also impracticable to attempt to fit most questions within a single category inasmuch as most were objected to for more than one reason. Furthermore we find that many of the questions on page 4 of your letter do not fit into any of the categories you list.

Finally, although your letter groups together your demands for document production with disputes arising out of the deposition of Barry Lando, for clarity's sake we have separated our comments on document production from those on deposition questions.

With regard to the testimony of Barry Lando, many of the questions which we objected to and directed the witness not to answer were questions that had been previously asked and answered, rephrased after an objection was raised and answered in rephrased form, argumentative or rhetorical, or were questions which had no foundation or required the witness to characterize documents which had already been marked for identification. Oftentimes more than one of

these grounds led to our objections and direction not to answer. Our remaining objections were made either because the questions were not relevant to any issue in this case and were not reasonably calculated to lead to the discovery of admissible evidence, or they were subject to a privilege (attorney-client, work product or materials prepared in anticipation of litigation or for trial).

Plaintiff has had 26 deposition sessions with Barry Lando, which produced nearly 3000 pages of transcript, with 240 exhibits. There has been extensive testimony by Barry Lando as to whom he interviewed, his discussions with interviewees and all forms and frequency of communications with them. Plaintiff has had full discovery as to the facts known to Barry Lando in the preparation and production of the 60 MINUTES segment "THE SELLING OF ANTHONY HERBERT" and the article "THE HERBERT AFFAIR." Plaintiff has also conducted nine other deposition sessions in connection with the discovery of defendants Atlantic Monthly Company, Mike Wallace and CBS, Inc.

Many of the questions to which we have raised objections concern subjective matters calling for inquiry into the witness' credibility evaluation of other witnesses' fact assertions, his beliefs, his intent, the editorial basis for including or excluding material, his conclusions and opinions and the basis for same. These questions do not seek to elicit facts but rather inferences to be drawn from the witness' testimony. Such questions are not a proper subject for discovery.

Regarding your demand for document production, as Barry Lando's response to your first request for the production of documents indicated would be done, he has produced all documents in his possession, custody or control which were prepared for or in the course of the preparation,* production and broadcast of the 60 MINUTES segment, "THE

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* Documents relating to expenditures incurred by Barry Lando during the course of the preparation of the 60 MINUTES segment "THE SELLING OF ANTHONY HERBERT" have been and will continue to be objected to on the grounds that such documents are not relevant to any issue in this action and are neither admissible nor reasonably calculated to lead to the discovery of admissible evidence, and such a document request is burdensome and oppressive.

SELLING OF ANTHONY HERBERT", and all documents prepared for or in the course of the preparation and publication of the article "THE HERBERT AFFAIR." All other documents requested relate to such areas as Lando's general custom and practices as an employee of CBS (item 4), or to conversations or communications between Lando and representatives of the Nixon Administration or White House staff concerning CBS coverage of the Vietnam war, war crimes or bias on the part of the White House staff against news media in general or CBS in particular (your item 10). As to these areas, we do not see how such discovery is relevant to any issue in this action, admissible or reasonably calculated to lead to the discovery of admissible evidence.

Post-litigation documents -- item 17 in your letter -- are clearly objectionable on the basis of privilege in that any such documents were prepared in defense of litigation or as attorney's work product.

We look forward to meeting with you on July 2nd at 9:30 A.M. in the hope of resolving some of these matters before our conference with Judge Haight on July 6th.

Very truly yours,

GREEN & HILLMAN

By Richard G Green
RICHARD GREEN

cc: Honorable Charles S. Haight, Jr.
United States District Judge
U.S. Courthouse
Chambers, Room 2904
Foley Square
New York, N.Y. 10007

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*NEW JERSEY BAR ONLY

IRVING MOROSS
OF COUNSEL

July 16, 1976

Richard G. Green, Esq.
Green & Hillman
1270 Avenue of the Americas
New York, New York 10020

Re: Herbert v. Lando, et al.
74 Civ. 434 (CSH)

Dear Dick:

We have reviewed the open questions which Barry Lando was directed not to answer at his deposition. As we indicated to you at our last conference, we are setting forth below those open questions which we will not pursue in connection with plaintiff's Rule 37 motion.

Our elimination of the questions listed below is not intended as any agreement on our part with the direction to Mr. Lando not to answer those questions. Rather, this list represents our attempt to reduce the areas of dispute between us and our recognition that some of the questions were substantially answered during the deposition and other questions were answered before objection was made.

The questions which we propose to eliminate and which were referred to in our letter of June 22, 1976, appear at the following transcript pages of the Lando deposition: 418-422, 503-506, 807, 840-842, 921-922, 1094-1098, 1147-1149, 1452, 1567-1571, 1610-1611, 1629-1630, 1741-1746, 1841-1842, 1909-1911, 1943-1946, 2021-2029, 2063-2064, 2071-2072, 2112, 2158, 2175-2176, 2178-2180, 2182-2183, 2341-2342, 2391-2393, 2480, 2505-2506, 2577, 2594, 2658-2660, 2694.

We trust that you have also given serious reconsideration to your position on the open questions which remain. We are hoping

to receive a revised list from you indicating a further reduction of the issues to be raised before Judge Haight on July 21, 1976.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

Jonathan W. Lubell

JWL:mf

BY HAND

cc: Hon. Charles S. Haight, Jr.
United States District Judge
U. S. Courthouse
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IRVING MOROSS
OF COUNSEL

July 19, 1976

Carleton G. Eldridge, Jr., Esq.
Coudert Brothers
200 Park Avenue
New York, New York 10017

Re: Herbert v. Lando, et al. - 74 Civ. 434 (CSH)

Dear Carl:

We set forth below any changes or modifications of plaintiff's position as previously described in the correspondence between us on questions that defendants Mike Wallace and CBS (Hewitt and Leonard) were directed not to answer and on certain Rule 34 document requests to which the said defendants Wallace and CBS objected. In arriving at our current position, we have considered our discussion of July 2 and 6, 1976, and your comments. We will generally follow the form of your July 1, 1976 letter.

Preliminarily, we note that our position on the open questions and demands rests upon the rules of law governing the nature of the evidence admissible in a libel case. As the Court of Appeals for this Circuit stated in Goldwater v. Ginzburg, 414 F. 2d 324, 342 (2nd Cir. 1969):

> "There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity."

PLAINTIFF'S PARAGRAPH (1): "Questions about or documents relating to the usual custom and practices of CBS concerning the production and presentation of '60 Minutes' segments."

WALLACE:

P. 279, l. 15 Plaintiff withdraws this question.

PLAINTIFF'S PARAGRAPH (5): "Questions about or documents relating to conversations or communications between Wallace and/or employees of CBS concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon which took place after the broadcast on February 4, 1973."

There are no questions under this paragraph which CBS's representatives or Wallace were directed not to answer. You have advised us that apart from documents requested by counsel or acquired by counsel, defendants are not aware of any additional documents relevant to the request. In light of this advice, plaintiff will not further press this particular request.

PLAINTIFF'S PARAGRAPH (7): "A document identified by Barry Lando as a CBS memorandum on the subject matter of a request from the attorney for Col. J. Ross Franklin to obtain CBS' cooperation in providing information in connection with a possible lawsuit against Col. Herbert, and questions concerning that memorandum."

HEWITT:

P. 109 - 113. You indicated to us that you would advise us of the list of addressees to whom the subject memorandum was circulated. We will request the Court to conduct an in camera inspection of the memorandum. If the memorandum is thereafter produced, we will have certain questions to ask. You have indicated you will bring the memorandum with you to Court on July 21, 1976.

PLAINTIFF'S PARAGRAPH (8): "Documents in the possession of CBS, its agents, representatives or employees, during the period from June, 1971 to February 4, 1973 regarding (a) Col. Herbert, (b) war crimes, (c) conduct of the 173d Airborne Brigade in Vietnam, (d) individuals appearing or referred to on the '60 Minutes' segment, or (e) events set forth in Soldier."

You have advised us that you have produced all documents in the possession of Mike Wallace and CBS gathered or generated during the research, preparation and broadcast of the '60 Minutes' segment on Col. Herbert relevant to the matters set forth in Paragraph 8. At our conference you further advised us that CBS and Wallace had produced all documents in CBS' possession that Wallace and Lando knew of at the time the program was being researched, prepared and broadcast relevant to the matters set forth in paragraph 8. We will continue to seek the production of all documents

in the possession of CBS, its agents, representatives or employees during the period from June 1, 1971 to February 4, 1973, regarding Col. Herbert, the 173d Airborne Brigade while in Vietnam, individuals appearing or referred to on the '60 Minutes' segment and events described in Soldier. In this connection, we are willing to restrict the document requests to documents in the possession of CBS News, as distinguished from the entire CBS corporate entity.

PLAINTIFF'S PARAGRAPH (9): "Documents relating to correspondence or communications between Wallace and/or employees of CBS and (a) Gerard McCauley, plaintiff's agent, (b) James Wooten, plaintiff's co-author of Soldier, (c) Holt Rinehart & Winston, publisher of Soldier, and (d) employees or representatives of Atlantic Monthly concerning Col. Herbert, his charges, and/or the truth and accuracy of the '60 Minutes' segment or any individual appearing or quoted thereon."

Similar to plaintiff's paragraph 8, you have advised us that all documents in the possession of Mike Wallace and/or CBS which were acquired or generated in connection with the research, preparation and broadcast of the '60 Minutes' segment relevant to the matters set forth in paragraph 9 have been produced. Included in such documents, you have further advised us, are all documents which were in CBS' possession at the time the program was being prepared and were known to Wallace and Lando at that time. We will continue to seek the production of any other documents which were in the possession of Mike Wallace and/or CBS during the time the program was being prepared and which are relevant to the matters set forth in paragraph 9, whether or not Wallace or Lando had specific knowledge of such documents at that time.

PLAINTIFF'S PARAGRAPH (11): "Documents relating to communications between employees of CBS and employees of Holt Rinehart & Winston concerning royalty payments to plaintiff or James Wooten in connection with Soldier."

You have advised us that CBS will produce correspondence, memoranda and telephone logs, if any exist, relating to or concerning the payment of roylaties or advances. With the completion of this matter, we will not further pursue the request for other documents under this paragraph.

In connection with areas concerning communications, etc. between the White House Staff and CBS officials concerning CBS' presentation of news of the Vietnam war and war crimes, we note that facts have come to light over the last three years about substantial pressure on CBS, as well as other media, to present a certain

particular viewpoint on those issues. According to former White House officials and other sources familiar with activities during the Presidency of Richard M. Nixon, such pressure occurred in specific conversations with CBS officials, involved those particular subjects and resulted in programming changes. We believe such information is relevant to the motive of CBS in presenting the segment on Colonel Herbert - with its distortions and deliberate exclusion of material facts.

We hope that you will reconsider the position of Wallace and CBS and be able to further narrow the areas of dispute.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

Jonathan W. Lubell

JWL:mf
BY HAND

cc: Honorable Charles S. Haight, Jr.
United States District Judge
U. S. Courthouse
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mps

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

ANTHONY HERBERT, Plaintiff, vs. BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., and ATLANTIC MONTHLY COMPANY, Defendants.	74 Civ. 434

Before:

HON. CHARLES S. HAIGHT, JR., District Judge.

New York, July 21, 1976;
9.30 o'clock a.m.

APPEARANCES:

COHEN, GLICKSTEIN, LURIE, OSTRIN & LUBELL, Esqs.,
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1370 Avenue of the Americas
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BY: RICHARD G. GREEN, Esq.,
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BY: E. G. ELDRIDGE, JR., Esq., and
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BY: FRANK CURTIS, Esq.,
Of Counsel.

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(Case called.)

MR. LUBELL: Plaintiff is ready.

THE CLERK: All sides are ready, your Honor.

THE COURT: All right.

Now, ladies and gentlemen, we have a limited amount of time available to us today, because I have to resume a jury trial at about 10.15, but it seemed to me it might be useful to have this session today and perhaps work out some guidelines, or at least I can receive some further guidance from you.

I have read the exchange of correspondence among counsel on disputed discovery matters, and it seemed to me that was a helpful exercise.

Let me just indicate some of the questions and areas of concern that I have, in no particular order, and we can talk about them, and this hearing today may give rise to rulings on certain general areas of discovery.

I may also indicate the necessary for further briefs or authorities.

Let me start with the general area of privilege.

As I understand the papers, there are two claims of privilege that are made. The first relates

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to the journalist's privilege, as contained in the New York civil rights statute, and I gather that in that context Mr. Wallace resists answering questions about some of his discussions and contacts with people at the Pentagon; is that so?

MR. LUBELL: Yes, your Honor.

THE COURT: All right. The difficulty I have with the New York civil rights statute is that it appears to address the question of whether someone who refuses to answer can be punished by contempt, either by the Court or in connection with a grand jury indictment.

The purpose of that staute as to what is presented here troubles me somewhat. If I conclude that the particular question or questions that we are concerned with are proper subjects of pretrial discovery and direct Mr. Wallace to answer and he does not do so, there is no question of contempt that necessarily arises. I can simply strike the defendant's answer for failure to comply with the discovery order. There is no contempt proceeding. No one goes to prison. Some money may change hands shortly thereafter, but I have a little difficulty understanding the applicability of the New York no-contempt proceeding statute to this particular case. Can someone enlighten me on that?

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Who appears for Mr. Wallace?

MR. ELDRIDGE: I do, sir. I am Mr. Eldridge.

THE COURT: All right, Mr. Eldridge.

MR. ELDRIDGE: Well, basically, Judge, historically speaking, my understanding of the statute was that in cases prior to the legislative enactment the Court, when a reporter on a constitutional basis, felt that he did not have to disclose the source from whence he obtained certain information in his news gathering activity, normally in various jurisdictions there have been cases which went one way or the other depending on the particular case.

For example, in criminal cases the privilege has been struck down more frequently that in civil cases, with the balance of society's need for the information in mind, as I would presume.

In the case where a reporter in a civil case has failed to respond and the Court felt a response was indicated and so directed, the reporter was customarily given time to consider what position he would take now in face of a Court directive. If he responded in the negative, as Torre did at one time, why, then, the Court exercised its contempt powers and directed either a fine or incarceration, subject to the witness responding to

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the question.

THE COURT: Now, Torre was a libel case, was it not?

MR. ELDRIDGE: Yes, your Honor.

THE COURT: Was Miss Torre a party or a defendant in that case?

MR. ELDRIDGE: No. She was a witness.

THE COURT: Well, isn't that a significant difference in this case? Mr. Wallace is a party defendant. If --

MR. ELDRIDGE: I was just getting into the historical background. I mentioned Torre as an example that occurred in this court.

Beginning with the basis of the background, the legislators in their wisdom felt if a contempt in this question of privilege was not a desirable result in terms of First Amendment freedoms the result was that they took away a judicial power. Now, they do not, and I think you are correct, take away any powers that the Court would otherwise have. That is the basis of our raising the question of privilege.

When we do, we base it on our First Amendment constitutional rights, which in our judgment may be broader than the statute in its narrow legislative accomplishment.

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That is the historical concept of my understanding of the New York statute.

THE COURT: Well, to evaluate the First Amendment constitutional right problem, I suppose I am required to enter into a balancing process. That is what the cases indicate to me from my first examination of them. On the one hand, the availability of this information, or this material, is relevant to the plaintiff through other sources; on the other hand, the purpose of preserving the reporter's confidentiality.

I think that on the question of privilege I am going to require briefs from counsel. I understand the positions. That appears from the letter. But I would appreciate memoranda of law on the confidentiality question, based upon the New York statute or the Federal statute or anything else, in respect to those questions, where Mr. Wallace declines to answer on the basis of privilege.

MR. ELDRIDGE: There is only one.

MR. GREEN: There is only one question.

THE COURT: Only one question?

MR. LUBELL: That is right.

THE COURT: Well, it could lead --

MR. LUBELL: We were cut off in the course of

the examination, and we weren't going to make a lot of objections.

2 MR. ELDRIDGE: It is a question of the sources of information, Judge.

THE COURT: It is in the Wallace deposition, that particular question, isn't it? Which page is that?

MS. O'MELVENY: Page 226.

THE COURT: Yes. The question appears to be:

"Q Could you identify to us who the Pentagon people were who speculated that the reason the Generals didn't want to talk was because of so many true stories of war crimes?"

That is the question at issue, tied up with the question of privilege, the journalist's First Amendment right.

All right. I would appreciate memoranda of law directed to the privilege question that arises out of that question.

Now, on the attorney-client privilege, I am a little puzzled by that claim of privilege as it relates to the Col. Franklin memorandum. I may not fully understand what is going on there, but, as I understand it, there is in existence a memorandum referring to some of

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Col. Franklin's communications looking towards possible joining in litigation with CBS.

What I don't understand is which attorney is involved in the attorney-client privilege that is asserted in connection with that memorandum and which client. Can someone enlighten me on that?

MR. ELDRIDGE: Well, perhaps we can address it jointly.

THE COURT: Yes.

MR. ELDRIDGE: It comes up, if my chronology is correct, shortly after Col. Franklin instituted, independent of this litigation, a lawsuit against Reinhart & Winston, relating to a book authored by Jim Wooten as told to Tony Herbert, which is a CBS subsidiary, and a letter from Col. Franklin's lawyer came to Barry Lando, a CBS employee.

MR. GREEN: A letter or a request. I'm not sure.

MR. ELDRIDGE: Barry Lando turned it over to the CBS Law Department for advice. The Law Department memorandum is from the CBS Law Department to people in the News Department and Barry Lando and several other members of the Law Department of CBS who are interested in litigation and general matters, including the assistant

general counsel, giving him advice as to what he should do in terms of the letter or request from Col. Franklin's lawyer which preceded a lawsuit which Col. Franklin did in fact file against Reinhart & Winston.

It is a memorandum dated July 17, 1973, written by Michael Golde to people I have noted. Michael Golde was at that time a member of the News Department, and the memorandum was advising the news people.

It is the position of CBS that this is a privileged document in terms of advice given by lawyers in connection with a matter arising from the outside, where the member of the News Department sought the legal advice as to what to do, from the Law Department.

THE COURT: And the memorandum in question is not the communication from Col. Franklin to Mr. Lando. What we are talking about is the responsive memorandum prepared by CBS.

MR. ELDRIDGE: The memorandum upon privilege is claimed is the letter written by Mr. Golde to CBS news people, including Mr. Lando and the assistant general counsel.

THE COURT: Why isn't that privileged, Mr. Lubell?

MR. LUBELL: First of all, the letter from

Col. Franklin's lawyer to Mr. Lando --

MR. ELDRIDGE: The memo?

MR. LUBELL: -- from Col. Franklin's lawyer to Mr. Lando has never been produced.

MR. GREEN: I have never seen the letter before. I presume it was turned over --

MR. ELDRIDGE: We wouldn't be claiming privilege as to this. It may be that the two were attached together. You can't claim privilege on Col. Franklin's letter to Mr. Lando.

THE COURT: Yes. I agree with that.

MR. LUBELL: This is the first I have heard of a document. I am just pointing that out. I thought it might be a telephone communication.

MR. ELDRIDGE: He would have had a conversation possibly with the Law Department.

MR. LUBELL: Insofar as the memorandum itself is concerned, the legal memorandum, that is, the memorandum received from the CBS legal staff, we believe there is an area where in a libel case such communications are prudicible, are discoverable. We had requested at this hearing to have some clarification as to the memorandum in order to argue about this further, as to who the addressee was, who were the people receiving it, and

it still isn't clear when Mr. Eldridge says "The CBS news people" -- it still is not clear to us who that is, whether that is "Sixty Minutes" or beyond "Sixty Minutes" or where the memorandum was disseminated, and I would like to know that information, and I think I would like to have an opportunity to brief the area where there is an exception to the confidential communication protection between attorney and client in libel cases because of the particular importance of those communications in terms of the publisher, or the one who publishes the alleged libel, as to his knowledge or belief that he has as to the falsity or truth of what he ultimately publishes.

THE COURT: Yes. I think that this question should be briefed also within the general context of privilege.

Now, let me turn to some other general subjects.

What I have tried to do --

MR. CURTIS: Your Honor, there is also a question of attorney-client privilege involved in the open questions involving the defendant Atlantic, and maybe we should deal with those if we are going to cover the question.

THE COURT: On Atlantic, all right. I see.

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What is at issue there?

MR. CURTIS: What is at issue are communications between the editorial personnel at Atlantic and their regular counsel concerning the article prior to and subsequent to its publication.

THE COURT: Is there an outstanding demand for discovery in that area?

MR. LUBELL: Yes; there is. The chronology of this is that there was an original communication, telephone communication, that he has testified to by the Atlantic people to their attorney out in Boston. He sent a letter. A copy of that letter was sent to Barry Lando. That letter was produced.

There is also testimony that there was subsequent communication or subsequent communications in those areas, subsequent communications between the Atlantic people and their attorney, which are different from the original communications, and I think that should be read within the whole privilege area.

THE COURT: Yes. I would be grateful if you would address that whole privilege area, Mr. Curtis. I simply hadn't been aware of that.

Now, in looking through the letters, I perceive another general area of inquiry, and that has to do with

the defendants' refusal up until now to answer questions on depositions concerning the usual procedule followed by CBS in producing segments of "Sixty Minutes". Am I correct in thinking that this is an area of controversy?

MR. LUBELL: I believe so, your Honor.

THE COURT: What do you mean by "usual procedure", Mr. Lubell? In what particular respect?

MR. LUBELL: What we mean in particular is that there are certain things testified to by Mr. Lando as to the procedures he adopted in preparing this particular segment. What we were trying to understand was whether this was consistent with the usual procedure or inconsistent with the usual procedure, based upon the concept that evidence of custom and usage, evidence of practice, evidence of habit are admissible circumstantial evidence from which inferences can be drawn in a number of different contexts, and in this context inferences can be drawn as to whether this was done recklessly, whether there was some unusual situation, unusual motivation that resulted in certain procedures being followed.

For example, one thing in particular I might point out is that there was a second filmed interview done of Col. Franklin, which Mike Wallace and everybody else in CBS testified they had no recollection of knowing

about at that time. We wanted to find out what the usual procedure was in regard to doing a second filmed interview. We were cut off at that point.

Obviously, our questions would have been on the subject of whether a second film would be usual to discuss with Mike Wallace or the supervisor who was putting on the program, to have a second interview.

All those circumstances never came out, and we believe that those areas are permissible areas of discovery, that they can lead to admissible evidence, and they can lead to circumstantial evidence from which inferences can be drawn.

That is our opinion under the procedures and practices.

THE COURT: Well, you know, Mr. Eldridge, I have a certain sympathy with that approach. The plaintiff has a difficult burden here, but what he is eventually going to ask the jury to do, I suppose, is to dra inferences from the evidence either of malice or reckless disregard.

Now, perhaps particularly with respect to reckless disregard, although not necessarily limited to that, it does seem to me it is pertinent to inquire as to the usual practices and procedures in preparing one of

1 these programs and then contrasting those practices or
2 procedures, whatever they may be, with the practices and
3 procedures that were followed in respect of Col. Herbert,
4 because out of that contrast, if one is established,
5 the seeds of an inference of either malice or careless
6 disregard may grow; but we really can't tell unless we
7 know what the other practices are.
8 I confess I have a certain sympathy with the
9 plaintiff on this aspect of it.
10 MR. ELDRIDGE: Well, Judge, I think when one
11 focuses upon the issue to which plaintiff's counsel is
12 addressing himself and which the Court has raised, we are
13 dealing with the "actual malice" issue, which relates to
14 the question of whether or not the defendant published
15 a calculated falsehood or whether he entertained serious
16 doubts as to truth. That is the definition of reckless
17 disregard.
18 That makes the test a subjective test in terms
19 of the state of mind of the defendant, not an objective
20 test, as the Courts have more recently suggested in their
21 language, and therefore, if I may, just with a sideline
22 story, in the handling of a case from South Dakota
23 involving the First Amendment, the chief Judge of the
24 District Court there, faced with the problem of NBC's
25

practices, said, to plaintiff's counsel, "Well, tell me how different would it be if NBC had a rule that truck-drivers or a trucking company had a rule that the drivers should never exceeed the limit of fofty miles an hour wherever they drive, and there is an accident that occurs on a super-speed highway, where the driver is driving within the prescribed limit of, say, sixty-five, and an accident occurs, and then you offer to the jury that NBC or the trucking company in the example prescribed in their rules that their drivers shall never exceed forty miles an hour."

Now, a jury should not be using the exhortative standards that the defendant might choose to use in measuring liability under the law, because he was not in fact speeding, and in fact to hand the jury, as the Chief Judge said to plaintiff's counsel, to hand these exhortatory rules that the trucking company would prescribe for their drivers would be unfair under the circumstancs, and he refused to allow the introduction into evidence of NBC News' rules and practices in a similar type case on an actual malice issue.

Now, I think that story I tell is merely illustrative of how his thinking was, and I submit it was correct and his ruling is correct.

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THE COURT: Is that a reported case?

MR. ELDRIDGE: Well, it occurs in the transcript, yes. It is Barry against NBC. My recollection is that the colloquy may be in the transcript. It occurred in chambers.

The case is a reported case, yes, the trial result and the appellate result.

4 THE COURT: But even assuming, even accepting the subjective as opposed to the objective test, I still don't see where certain inferences could not be drawn on the subjective test from an examination of practices and procedures.

Let me give you a hypothetical, somewhat closer to home that the truckdriver.

We have a read a lot about the Woodward and Bernstein practice of never printing anything unless they have it corroborated by at least two independent sources. Now, just assume for the sake of the argument that discovery would indicate, in respect of the preparation of the "Sixty Minutes" program, that such a practice or something like it was followed, and suppose it should also develop that in respect of the program on Col. Herbert, such a practice was entirely departed from.

MR. ELDRIDGE: They only had one, you mean,

one source in your hypothetical, as opposed to two?

THE COURT: Yes, or something along that line, that there was a practice or procedure in respect of the verification of information which was generally followed in the other programs but in a rather dramatic fashion was departed from on the Col. Herbert program.

I am not suggesting for a minute that is so. We are dealing in hypotheticals.

But if such evidence was developed, couldn't an inference be drawn from that contrast with respect to the subjective frame of mind of the people who were putting the program together?

MR. ELDRIDGE: The trouble I find with that, Judge, is that that is not too different -- your example is not too different from the forty miles an hour that the trucking company might prescribe.

Now, the Courts have said that, for example, one source for a piece of information is more than adequate. There is no duty to go out and investigate beyond. Now, if you have a bona fide source for a piece of factual information, as we can only deal with published facts, I think that is made absolutely clear now, so if you have that, the Court would say that the plaintiff had not carried his burden of proving by clear

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2 and convincing evidence that the defendant had published

3 a calculated falsehood or there was a reckless disregard

4 for the truth because he only had one source.

5 Now, the publisher, because he liked to be

6 overly cautious in his approach, because he doesn't like

7 to be sued, suggested in this case that we ought to

8 have two sources. To let the jury know that he requires

9 his people to go beyond what is prescribed by the law

10 and then to permit them to speculate as to whether or not

11 he should be punished because he asked that they go

12 beyond what is required by the law I submit would be

13 highly unfair in this area of First Amendment freedoms

14 and under a subjective test. This jury could only find

15 an award against this defendant if they have transcended

16 and abused their First Amendment privilege, and the

17 mere fact that a publisher places higher requirements

18 upon those responsible for publication should not militate

19 against his First Amendment rights, and that is what this

20 plaintiff wnats to do.

21 THE COURT: How about the plaintiff's

22 argument that Col. Herbert was put into a very little,

23 wretched room, with bright lights, was made to squint and

24 look dreadful during the actual telecast?

25 MR. ELDRIDGE: That is the very same room

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where people were interviewed day after day, and this was the subject of factual testimony. You can ask how many interviews were conducted in that room regularly. I have no objection to that. That has nothing to do with your practices relating to source information.

THE COURT: Well, practices and procedures I suppose would include the physical arrangements.

MR. ELDRIDGE: Whether or not he was placed in a room which had never been used for interviews would have something to do with it, but I don't find that it equates with the type of question that we are talking about, and you and I were talking about the standard involved to defeat his First Amendment privilege.

If the Court likes, we certainly can supply cases to support this thesis. It is not a difficult one, and I think it is rather well established.

THE COURT: Yes, Mr. Lubell?

MR. LUBELL: First of all, I believe that in this Circuit, private safety regulations and rules are admissible for circumstantial evidence from which negligence, for example, or carelessness can be inferred, and I refer to the decision in this Court in Universe, 152 Fed. Supp. 903, which in turn discusses a number of other cases, so the question of whether a rule or regula-

tion of the defendant is admissible in this Circuit I think is fairly well established, that it is admissible.

I think that Mr. Eldridge's argument is that that rule is not a standard of safety but a standard of over-caution. He assumes a state of facts which leads to a particular answer.

I might also indicate that one of the areas of practice, one of the specific areas of practice that we wanted to find out about had to do with the reversal of questions and answers.

THE COURT: Of what?

MR. LUBELL: In the deposition of Mr. Lando, we found that he had changed the order of certain questions and answers that he had posed to Col. Franklin during his interview, filmed interview, changed it when aired on the "Sixty Minutes" segment. We found out that he had specifically called Col. Franklin and asked Col. Franklin's permission to do this on January 30th, a few days after the program went on the air.

In regard to Col. Herbert, the interview Mike Wallace did of Colonel Herbert, Colonel Herbert made a statement at the very beginning of that interview. That statement is placed at the very end of that "Sixty Minutes" program.

Now, we contend that these are reversals of order.

We have found out recently that after the Selling of the Pentagon program and prior to the preparation of this program, CBS promulgated specific guidelines on the reversal of questions and answers, and we do not have those, and those are types of practices.

We want to know what they did here, whether what they did here was consistent with those guidelines. If not, we want to find out something else about it, and I think we have a right to that.

Those are facts as to how this program was produced, from which various inferences concerning the question of malice, that is, knowledge of falsehood or reckless disregard to whether it was true or false, can be drawn, and I think we are entitled to that.

THE COURT: All right.

I will rule that plaintiffs are entitled to inquire into the general subject of usual procedures followed by CBS in producing segments of "Sixty Minutes". That is all I will say at this time. I will leave it to counsel to implement the Court's ruling, because there isn't time to deal with each particular question, but you must be guided by that general ruling, and if

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2 particular problems arise with respect to particular
3 questions, there will have to be further applications.
4 Another general subject appears to be a request
5 by the plaintiffs for full disclosure concerning com-
6 munications between the defendants and what is referred
7 to as the Nixon White House on a number of subjects.
8 Now, the first subject is Col. Herbert, but
9 then, as I understand the papers, that particular subject
10 is then expanded to include the following: CBS war coverage
11 in general; CBS coverage of war crimes and the bias by
12 the Nixon administration or the White House staff against
13 the news media in general or CBS in particular.
14 Now, I understand that there has been compliance
15 with respect to the first subject, namely, communications
16 between the defendants and the White House staff or
17 personnel with respect to Col. Herbert. The objection
18 that is made to the rest of it, Mr. Lubell, is that this
19 is not possible to comply with. What do you have to
20 say to that?
21 MR. LUBELL: If I might just focus on why we
22 thought the question was proper, what we were trying to
23 understand was the factual circumstances that existed in
24 the presentation of programs by CBS at that time, partic-
25 ularly news programs regarding the Vietnam War and war

crimes and the facts which have come out over the last several years regarding a consistent pressure by staff members of the White House on CBS as well as other media regarding the presentation of programs on those particular subjects and what has come out very recently, according to Mr. Colson, at least, in a communication between Frank Stanton of CBS and Colson regarding presentation of CBS programs on the war and war crimes.

We wanted to ascertain what was the course of discussion, what happened in the relationship between the White House and CBS in the presentation of those programs, did what happened result in a motivation by CBS to present a program that conformed to the White House's view of the war or of war crimes, was there pressure on CBS to slant a program? Were they motivated by reason of their motivation with regard to licenses et cetera to present a program in a particuar light, and on the questions of motivation, the inferences of motivation are the areas that we are after in terms of these communications.

We do know that there were communications between the White House and CBS regarding programs on the war and everything else. We know that from matters that came out during the Watergate-related investigations.

We do not know anything much more specifically, and if we were able to inquire from there to the specific situation, I think we would be able to determine whether in fact there was motivation to put on a program that presented a certain view of war crimes, a certain view that presented the Pentagon's view of this situation, and that is what we were after.

If we are too broad on that, maybe we can redefine it, but I'm not sure whether we can be more specific.

I have expressed what our intention is to counsel for the defendant and expressed it to the Court, hoping that it could be narrowed so as to come within those borders, but I think we have a right to try to ascertain whether in fact there was a situation that existed, an unfortunate situation which existed which did result in a particular motivation or a particular intention by CBS to put on a particular program of a particular position, and I might add that one of the interesting side notes is that the Selling of the Pentagon was the trigger for various communications between the White House and CBS and the trigger for this particular program was the interview of Col. Herbert.

THE COURT: What you mean to say is that

communications with respect to Col. Herbert don't give you all you need, necessarily, because out of all the general communications and statements made by the White House a foundation may be laid for the drawing of an inference that the defendants did what they did to Col. Herbert in order to try to placate some of these more general expressions of concern or pressure from the White House.

Is that what it comes down to?

MR. LUBELL: General concern and pressures from the White House specifically in the area of the Vietnam War and war crimes.

According to a number of sources, in fact, CBS did make programming changes after the Selling of the Pentagon.

THE COURT: It seems to me both broad and speculative.

What do you say, Mr. Eldridge?

MR. ELDRIDGE: Judge, I wouldn't know how to start such an investigation in terms of CBS news along, coverage of the Vietnam War or coverage of general areas.

We allowed him to ask questions about Col. Tony Herbert, and he asked questions in terms of communications between the White House and the Pentagon and

what-have-you, and the answer is no.

Now, he reads in the newspapers, as people do, what might be on the White House tapes, what communications might have occurred, and now he wants to go beyond the News Department and examine executive personnel, possibly former White House staff, in terms of communications that might have occurred, but not Col. Herbert.

6 When we restrict it to Col. Herbert, that is not enough.

Now, this case involves Col. Herbert, and the program even has his name in the program.

The Selling of the Pentagon, as the Court may remember, years before, related to a Congresssional investigation of whether Frank Stanton, then president of CBS, should be cited for contempt. Nothing was done on it.

Now, all the information we now have -- and I point out particularly, those responsible for the publication are the critical people involved -- he has examined those people at CBS, and he has gained from them all of the information we had or knew about or sources we communicated with, prior to the publication of this program.

Now, to go off on this tangent, particularly

in an area that makes it impossible for us to do our own discovery in the braod, general areas of war coverage et cetera -- I couldn't even make an estimate of the amount of news coverage the Vietnamese War had on CBS and other networks and what kind of communications, whether the gentlemen at the White House might have called and said, "You're showing an awful lot of blood in terms of the coverage of the Vietnamese War."

Well, he wants to go into questions about that, and I fail to see where that could lead to any discoverable evidence. It is just harassment of the defendant, because we have no way of going back to the files on the Vietnamese War to find that.

This should be related to Tony Herbert, and we have not prohibited his discovery in that area.

I might note that this Circuit just recently, on this Buckley case, which was decided June 30, 1976, in this Circuit, noted on the question of actual malice -- 4611, the slip opinion -- repeatedly the Court has said, "The ill will towards the plaintiff, bad motive, hatred, spite, a desire to injure are not the kind of malice that the Sullivan against New York Times case comprehends."

I would submit even such motive in terms of the most recent Second Circuit ruling would not lead to

the discovery of relevant evidence under the malice test, even if you compare the thesis of his argument to the logical conclusion and forget the problems we have in regard to the defense.

THE COURT: I am going to limit the plaintiffs on this subject of communications to communications between them and the White House relating to Col. Herbert. It seems to me that to go as far afield as the plaintiffs are attempting to go is much too broad, goes too far afield, and the potential probative value of such inquiries is not sufficiently significant in my judgment to warrant that expanded inquiry.

So, again, I will leave it to counsel to implement that general ruling.

Another area that appears to arise is questions which the defendants have refused to answer with respect to expenses incurred by CBS or its employees in preparing the "Sixty Minutes" segment.

I will rule that questions relating to expenses can and should be answered, but I will restrict the subject of expenses to the expenses of the actual reporters who were involved and those working under them in the gathering of facts for broadcast. That is to say, I don't see any significance or importance with respect to

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2 charges for cameramen or stagehands or things of that

3 nature.

4 It is my view that an examination of the

5 expenses incurred in the actual threshing of the wheat

6 which appeared in the program, particularly when con trasted

7 or viewed within the context of customary procedures for

8 this program, which I have also ruled are a proper subject

9 of discovery, may lead to admissible evidence.

10 MR. ELDRIDGE: May I have a moment on that

11 subject?

12 Our problem is a logistical problem. We don't

13 keep expenses in terms of program segments. I don't

14 know how we are going to find Barry Lando's individual

15 expenses in terms of the segment which is the subject of

16 the libel suit.

17 THE COURT: Well, if as a practical matter --

18 MR. ELDRIDGE: That is our problem.

19 THE COURT: If it simply can't be answered,

20 that is a sufficient answer under the rules. I am

21 addressing myself to the propriety of the field of

22 inquiry.

23 MR. ELDRIDGE: Well, you could conceivably

24 direct the staff to search CBS's news expenses for a

25 year to find Lando's records, but you can't go to a

segment here and pick out the expense items. I don't know where we would go to do this. That is what we are urging, that it is an impossible job, where the company doesn't keep its vouchers on a reporter's trip, say, from here to Washington, in terms of a particular segment.

THE COURT: Well, I may have misunderstood. I got the impression from the papers that the objection was one more of irrelevance than of practical impossibility. If it can't be answered, it is a sufficient answer to say so.

MR. ELDRIDGE: I don't know how you could direct it unless you contemplate an overbearing examination of our expense records.

THE COURT: I limit my direction to one which is to the effect that inquiries into expenses incurred with respect to this particular segment are a legitimate field of inquiry. That is all I am saying at this time. If at a subsequent time you interpose answers along the lines of what you have just said, Mr. Eldridge, then the sufficiency of those answers can be tested.

Another field of controversy -- and perhaps this is all we can cover this morning -- has to do with timing, as I understand it.

Let me see if I can pinpoint that. I under-

stand it to be an area of dispute as to whether the defendants are obliged to produce documents -- yes; it is a general inquiry, as I understand it, for the production of documents or the asking of questions regarding communications between CBS and Wallace and any individual appearing on the broadcast, which may have taken place subsequent to the segment's airing on television.

I understand that defendants' position is that they must produce and have produced all relevant documents in this category created prior to the broadcast but that they are not obliged to produce such documents or communications which took place after the broadcast.

Have I correctly characterized the area of disagreement?

MR. ELDRIDGE: As I understand, in the area to which you are addressing yourself, I believe our position was that in terms of the actual malice test, which is what this line of inquiry goes into, the test is whether or not the defendants charged with responsibility for the publication at the time of the broadcast published a calculated falsehood or entertained serious doubts as to the truth.

Now, to ask what kind of information came to their attention or questions or discussions, assuming they

are not privileged, or something after the claim is filed, what communications they had after that to me would not be probative of the state of mind of the defendants at the time of publication.

THE COURT: But how about the reckless disregard of the truth? Isn't that a possible basis of liability in this case?

We don't have, it seems to me, a hot news situation. Therefore, under the law, it seems to me, as I understand it, a possible avenue of liability is a complete or total or reckless disregard of truth or accuracy. Isn't that so?

MR. ELDRIDGE: Judge, you will look long and hard on a hot news issue to find a case which holds to the plaintiffs entitled to that.

Indeed, if you took all the magazine cases, which have considerable lead time -- and many of those cases made considerable law -- and you match them against all the broadcast cases of daily broadcasting or such as Berry, which is, you know, a journalistic venture, which has considerable lead time, you will find the rule of law is identical in each case.

There is no case which says whether you have a short lead time or a long lead time the rule of law will

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2 change, and indeed, with respect to reckless disregard,
3 I submit that the St. Amant case clearly, in the Supreme
4 Court, said that by reckless disregard for truth we mean
5 did the defendant entertain serious doubts as to the
6 truth, meaning those responsible for the publication.
7 Now, that has been refined to be a subjective
8 test, so it is no longr and it never has been, as I
9 understand St. Amant, a super-negligence test. It just
10 isn't that. And therefore, if you focus on what the
11 actual malice test is, it is the subjective state of mind
12 with respect to the knowledge of the defendant at the
13 time he communicates to third parties or publishes, and
14 when you go beyond that, you are just wasting your time.
15 Anything that he learns after that will not play a part
16 in what his state of mine was when he went to press,
17 because that is the critical time, and that alone, and
18 that is the point of our basic objection of getting into
19 all the communications that may or may not have been had,
20 inside or outside of the publishing house.
21 THE COURT: All right. I want a brief on
22 that. Include that in your brief, please, both parties.
23 I confess I would have thought that post-
24 broadcast communications might have led to evidence which
25 could then support an inference as to pre-broadcast state

of mind, but I understand what you are saying to me, Mr. Eldridge.

I prefer not to decide this particular aspect of the case until it is further briefed, and I think it is important that we do so at this time, because it goes very close to the bone.

It seems to me that the parameters of discovery are going to have a great deal to do with whether or not the plaintiff can sustain the burden which he has in the case, and therefore it seems to me it is a useful exercise for all of us to consider the disovery questions with considerable care and to brief these disputed areas on the law at this time.

I know it is going to be helpful to me in a situation where the plaintiff must essentially prove someone else's state of mind.

It does seem to me that discover is a most significant part of the case. I think it is out of the seeds of discovery -- perhaps more so in this situation than in most situations -- that out of those acorns the plaintiff's oak is either going to grow or not.

I wish I could continue this dialogue, but I can't.

I must get on to my jury trial.

I have made certain specific rulings. I have asked for briefs on others. I am aware that I have not touched all of the disputed areas in the discovery field. Therefore, counsel may address any additional questions that they wish in their briefs, and I think that main briefs on discovery questions should be filed and eschanged within a reasonable period of time.

What would counsel seuggest on that? I will get to it as soon as I have the briefs or as soon as I can thereafter, but what I have in mind is a fairly elaborate briefing on discovery issues, because it seems to me the questions are important for the reasons I have suggested, and I would welcome main briefs and reply briefs on discovery issues.

MR. LUBELL: Maybe the best thing is for counsel to discuss it among themselves.

THE COURT: Yes. Why don't you work out a schedule on that?

MR. ELDRIDGE: The only thing is that certain people I know are going to have vacations.

THE COURT: I understand. I won't put any pressure on counsel as to that. I think that is something you can work out yourselves, but I feel that I need further guidance on this and other areas, and I would be grateful for any help you can give me on that.

LAW OFFICES

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July 22, 1976

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19 West 44th Street
New York, New York

Re: Herbert v. Lando, et al.

Dear Messrs. Eldridge, Green & Curtis:

Following the discussion with counsel yesterday morning concerning the most convenient date for briefs from the parties on outstanding discovery disputes, I spoke with Judge Haight's law secretary, Mr. Schlessinger, about an exchange of main briefs on September 15, and an exchange of reply briefs on September 30. These dates are acceptable to Judge Haight.

In addition to those specific areas upon which the Judge has requested briefing by the parties, plaintiff will raise all remaining open issues set forth in our exchange of correspondence not disposed of by the Judge's rulings on July 21, 1976. If defendants determine that some of these disputed areas can be further reduced, we would appreciate being so ad-

vised as soon as possible.

Very truly yours,

COHN, GLICKSTEIN, LURIE, OSTRIN & LUBELL

Mary K. O'Melveny

Mary K. O'Melveny

MKO'M:llc

cc: Honorable Charles S. Haight, Jr.
United States District Judge
U. S. Courthouse
Chambers, Room 2904
Foley Square
New York, New York 10007

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

ANTHONY HERBERT,	:	Civil Action No. 74 Civ. 434 (CSH)
Plaintiff,	:	
-against-	:	
BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., and ATLANTIC MONTHLY COMPANY,	:	AFFIDAVIT IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL DISCOVERY
Defendants.	:	

----------x

STATE OF NEW YORK)
: SS.
COUNTY OF NEW YORK)

JONATHAN W. LUBELL, being duly sworn, deposes and says:

1. I am a partner in the law firm of Cohn, Glickstein, Lurie, Ostrin & Lubell, the attorneys for plaintiff. This affidavit is made in connection with plaintiff's motion under Rule 37, FRCP, to compel discovery.

2. The motion involves unanswered questions posed to defendants Lando and Wallace, to defendant CBS by Donald Hewitt and William Leonard and defendant Atlantic Monthly by Robert Manning and Richard Todd. In addition, various document demands addressed to Lando, CBS and Wallace, and Atlantic Monthly are also in issue. While the questions and document demands involve four different defendants and six witnesses, the legal issues raised by the objections thereto fall into certain definable areas which cut across the parties and witnesses. These legal issues are discussed in the accompanying Memorandum of Law. Set forth below are listings of the open questions and demands keyed to the points discussed in the Memorandum of Law.

A. Questions and Demands involving State of Mind - Conclusions, Intent, Motive. (POINT ONE of Memorandum)

1. Whether conclusion was reached by witness as to particular matter

p. 666 l. 20-22*

p. 774 l. 5-7

p. 1486 l. 12-17

p. 1490 l. 21-25

p. 1525 l. 18-22

p. 1554 l. 20-22

p. 1791 l. 21

p. 1877 l. 3-6

p. 1877 l. 15-16

p. 1900 l. 17-22

p. 1925 l. 11-13

p. 1926 l. 4-6

p. 1926 l. 10-15

p. 1953 l. 21-24

p. 1954 l. 4-6

p. 1955 l. 2-17

p. 2013 l. 21-24

p. 2085 l. 23 -
2086 l. 3

p. 2312 l. 18-19

p. 2453 l. 5-10

p. 2454 l. 8-11

p. 2888 l. 18-23**

*Page numbers not preceded by a letter refer to pages of the Lando deposition. In reference to the other depositions the following letters are used: W-Wallace, H-Hewitt,WL-Leonard,M-Manning, T-Todd
**This page reference and the ones following were not specifically set forth in the exchange of correspondence between plaintiff's counsel and counsel for Lando. However, all of these questions fall directly within item (6) of the O'Melveny letter of June 22,1976 to Green["questions concerning Lando's opinions and conclusions concerning the truth and accuracy of persons interviewed, appearing on or referred to in connection with the "60 Minutes" segment or the Atlantic Monthly article"]. That letter stated the items described therein as the subject of plaintiff's Rule 7 motion. As soon as counsel realized the omission of these specific pages, the information, on the morning of September 21,1976, was telephoned to Lando's counsel.

p. 2889 l. 5-9

p. 2889 l. 16-18

p. 2890 l. 7-11

p. 2890 l. 15-16

p. 2890 l. 19-21

p. 2891 l. 6-10

p. 2891 l. 13-14

p. 2892 l. 4-7

p. 2892 l. 12-15

p. 2892 l. 17-19

p. 2892 l. 21-24

H p. 151 l. 24 -
152 l. 3

2. Basis for conclusions which witness testified he reached

p. 668 l. 8-9

p. 1530 l. 22-23

p. 1748 l. 4

p. 1892 l. 18-22

3. Basis for including certain statements and excluding contradictory statements

p. 876 l. 19-23

p. 878 l. 19 -
879 l. 2

4. Intention in including certain statements and excluding other statements

p. 525 l. 12-18

p. 668 l. 12-13

p. 668 l. 16-18

p. 1138 l. 18-21

p. 1139 l. 2-6

p. 1139 l. 10-15

p. 1790 l. 17-22

p. 1905 l. 11-
1906 l. 8

p. 1907 l. 15-
1908 l. 3

5. Conversations regarding the inclusion of certain statements and exclusion of other statements

p. 586 l. 15-19

p. 880 l. 5-7

p. 1754 l. 25-
1755 l. 7

p. 1789 l. 24-
1790 l. 2

6. General state of mind

p. 176 l. 3-6

B. Questions and Demands Concerning Activities and Occurrences after Publication (POINT TWO of memorandum)

p. 1331 l. 23

p. 1717 l. 6

p. 2303 l. 6-9

p. 2303 l. 13-15

p. 2556 l. 17-20

p. 2572 l. 4-7

p. 2573 l. 2-5

p. 2583 l. 18-21

p. 2685 l. 8-13

M p. 198 l. 11-13

M p. 203 l. 18-
204 l. 1

M p. 234 l. 21-24

M p. 236 l. 2-4,7-8

T p. 117 l. 18-20, see
p. 118 l. 6-10

T p. 143 l. 16 -
144 l. 9

Documents described under Item 17 of O'Melveny letter of June 22, 1976 to Richard G. Green

Documents described under Item 12 of O'Melveny letter of June 22, 1976 to Carleton G. Eldridge, Jr.

C. Questions and Demands Concerning a CBS Document Relating to Lando and Col. Franklin's Suit Against Herbert (POINT THREE of Memorandum)

p. 724 l. 24-25

p. 977-978

H p. 109 l. 18-24

Document described under Item 7 of O'Melveny letter of June 22, 1976 to Carleton G. Eldridge, Jr.

D. Questions and Demands Concerning Communications Between Atlantic Monthly and Conrad Oberdorfer (or other counsel) involving Lando's Manuscript and Article (POINT FOUR of Memorandum)

M p. 119 l. 22-24

See item 11 of Lubell letter of June 25, 1976 to Frank Curtis and Item 11 of Curtis letter of July 2, 1976 to Lubell

3. In addition to the above matters, there remains a dispute concerning (A) documents in the possession of CBS News, Wallace or Lando during the period from June 1, 1971, to February 4, 1973, (to May 1973 in regard to Lando) regarding Col. Herbert, the 173d Airborne Brigade while in Viet Nam, individuals appearing or referred to on the 60 Minutes segment and events described in Soldier and (B) documents relating to communications or correspondence with McCauley, Wooten, Holt Rinehart & Winston and employees of Atlantic Monthly concerning Herbert, his charges, and/or the truth and accuracy of the "60 Minutes" segment

or any individual appearing or quoted thereon. (See O'Melveny letter of June 22, 1976, to Green, Items 13 and 14 and Lubell letter of July 19, 1976, to Eldridge, Items 8 and 9). The area of dispute that remains concerns the production of documents that were in the possession of the parties indicated during the stated time period and concerning the described subjects but which were not specifically known to Wallace and Lando at the time the Program was being produced. Plaintiff believes that such documents are discoverable in that they are likely to lead to the discovery of admissible evidence relating to whether defendants published the charged libel in reckless disregard of its truth or falsity. As noted in POINT ONE of the accompanying Memorandum, various matters are admissible as some evidence bearing on defendants' state of mind.

4. In connection with the communications between Atlantic Monthly and its attorneys I have attached hereto the letter of March 9, 1973, from Conrad Oberdorfer to Atlantic Monthly. Other exhibits and documents referred to in plaintiff's Memorandum will be submitted upon request of the Court.

5. In connection with the refusal of defendants to answer questions or produce documents after publication based upon a claim of "work product," the bringing of a suit against CBS and Atlantic Monthly became an expectable contingency on December 11, 1973. Prior to that date I had been representing Colonel Herbert in a libel suit brought against him, James Wooten and Holt Rinehart and Winston arising out of the book Soldier. Approximately two days prior to December 11, 1973, Herbert, myself and other

counsel from my firm came to the conclusion that we could anticipate a legal suit being brought by Herbert against CBS and Atlantic Monthly. The first time this anticipation was communicated to an outside person was on December 11, 1973, at a conference with Timothy Dyk, Washington D.C. counsel for Holt, a subsidiary of CBS. I am not aware of any expectation by Herbert prior to approximately December 9, 1973, that a suit would be brought against CBS or Atlantic Monthly.

6. Plaintiff has excluded from his brief any discussion of defendant Wallace's claim of journalist's privilege, based upon a telephone call I received on September 17, 1976 from Wallace's attorney, Paul Jones, advising me that Wallace will not continue to attempt to assert that privilege.

7. For the reasons stated in the accompanying Memorandum of Law I respectfully request that this Court direct defendants to answer the questions to which they have objected and to produce the documents which they have refused to produce in the course of pre-trial discovery in this case.

JONATHAN W. LUBELL

Sworn to before me this
22nd day of September, 1976

Notary Public

MARY K. O'MELVENY
Notary Public, State of New York
No. 31-8219570
Qualified in New York County
Commission Expires March 30, 1976

Re Ex 206 inc
6/1/73 AM

CHARLES F. CHOATE, JR.
1869-1927
JOHN L. HALL
1892-1960
RALPH A. STEWART
1904-1928

CHOATE, HALL & STEWART
28 STATE STREET
AREA CODE 617
TELEPHONE 227-5020
CABLE ADDRESS CHOHALSTE

BOSTON, MASS. 02109

March 9, 1973

Mr. Robert Manning,
Editor in Chief
The Atlantic Monthly
8 Arlington Street
Boston, Massachusetts 02116

Re: THE SELLING OF COLONEL HERBERT
by Barry Lando

Dear Bob:

This will supplement my telephone message earlier this week to the effect that I saw no legal objection in principle to your going ahead with the Lando article, but that I had some possible reservations which I would specify later. Here they are, and they are very few.

It may be advisable to remove the gratuitous reference to Arnheiter in connection with "liar" in line 6 on page 16 even though this only purports to quote Wallace.

If you want to be abundantly cautious, you might use something such as "invention" or "fiction" in a few places instead of "liar," and similarly for the verb. E. g., last line on page 16 and fourth on page 17. On page 13, line 9, and page 33, line 12, "liar" appears to have been already deleted. The same seems to be true of the reference to a "skunk" on page 14, line 15.

As an editorial comment, "1962" in line 8 on page 23 is obviously an error.

I understand that between the public interest aspects of the article (~~summarizing~~ exposure to liability) and the generous publicity L'affaire Herbert has already received (making it hard to see what substantial additional damages would be found in his favor), the risk of a successful libel suit by Herbert (or anyone else) is very small.

Best Regards

BEST COPY AVA

Apropos publicity, you may add the enclosed review of the book and an interview with Herbert, from National Review and B.A.D., respectively, and these from rather opposite quarters, to your files, if you have not already seen them.

The B.A.D. piece quotes Herbert, quoting in turn the following as a "most important" statement allegedly made by Lando in the presence of three witnesses: "I'll get you, Herbert." If the Lando article were to contain serious untruths and if Lando's threat could be proved, Herbert might have a considerably easier case. While I am not making either of these assumptions, I recommend nonetheless that you query Lando regarding his alleged statement and keep a memorandum of his denial or explanation of what he meant. If he were to admit to anything even suggesting "malice" against Herbert in the sense of willingness to ruin or damage Herbert's reputation regardless of the facts - certainly not something that is likely or apparent from the tenor of this article as a whole - you would of course have serious second thoughts, even without my advice regarding the effect this might have if Herbert ever did bring a suit. In connection with the Lando threat, however, I note in passing that according to Lando (page 45, end of first paragraph) Herbert also accused the Army of having in effect determined to "get this guy" (Herbert).

Sincerely yours,

Conrad

Conrad W. Oberdorfer

CWO:dbw
Enclosures

ILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ANTHONY HERBERT, :

Plaintiff, : 74 Civ. 434-CSH

-against- : MEMORANDUM AND ORDER

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY, :

Defendants. :

- x

Appearances:

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HAIGHT, District Judge:

Plaintiff in this defamation action seeks an order compelling discovery pursuant to Rule 37(a)(2), F.R.C.P. Defendants vigorously resist the motion. The case presents interesting questions, one of which, insofar as the excellent briefs of counsel and the Court's own research indicate, is one of first impression. That question is:

Within the context of New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny, and the heavy burdens of proof they place upon "public figure" plaintiffs in defamation actions, what are the proper boundaries of pre-trial discovery?

I.

The plaintiff is Lieutenant Colonel Anthony B. Herbert (U.S. Army, Ret.) ("Herbert"). He has brought an action for defamation against defendants Columbia Broadcasting System, Inc. ("CBS"), Mike Wallace ("Wallace"), Barry Lando ("Lando") and Atlantic Monthly Company ("Atlantic"). The subjects of the action are a broadcast presented by CBS on its 60 MINUTES Program, produced by Wallace and Lando, and an article subsequently published by Atlantic and written by Lando.

Herbert alleges that both the program and the article maliciously portrayed him as a liar, one who had committed acts of brutality and atrocities in Viet Nam and an opportunist seeking to use the war crimes issue to cover his own alleged failures in the Army.

Col. Herbert, a much-decorated Army officer, was stationed in Viet Nam from September, 1968 until early April, 1969, first as Acting Inspector General for the 173rd Airborne Brigade and thereafter as Commanding Officer of the 2nd Battalion of the Brigade until he was relieved of his command on April 4, 1969. Herbert has consistently contended that, while in Viet Nam with the 173rd Brigade, he observed and was distressed by many war crimes and atrocities, committed by American troops. According to Herbert's account, he reported these events to his superior officers, a Col. Franklin and a General Barnes; and, when these officers took no action in respect of Herbert's reports, Herbert brought formal charges against Franklin and Barnes. These charges resulted in an investigation by the Army, the results of which are not material to this motion.

During the course of these activities, Col. Herbert received considerable publicity. It is conceded that, in consequence, Herbert is a "public figure" as defined by the United States Supreme Court in Curtis Publishing Co. v. Butts, 388 U.S. 130 (1967), and more recently in Gertz v. Robert Welch, Inc., 418 U.S. 323, 342, 345 (1974):

> "Those who, by reason of the notoriety of their achievements or the vigor and success with which they seek the public's attention, are properly classed as public figures...
>
> "For the most part, those who attain this status have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power

> and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment."

On February 4, 1973 CBS broadcast a program in its television series 60 MINUTES. A major segment of that telecast concerned Col. Herbert. Herbert alleges in this suit that the program falsely and maliciously portrayed him as a liar in his assertions that he had reported atrocities to Col. Franklin or General Barnes; as a man capable of brutality to Vietnamese prisoners; and as a person who had used the war crimes charges against his superior officers as an excuse for his own relief from command.

Defendant Lando was the producer of the telecast in question; defendant Wallace was the narrator and one of the interviewers. In its May, 1973 issue, defendant Atlantic published an article by Lando about Herbert, which discusses the 60 MINUTES Program, Lando's activities in producing the program, and a book which Herbert had written entitled "Soldier". Herbert puts forward comparable allegations of defamation in respect of the Atlantic article.

The defendants deny that the statements concerning Herbert appearing in the telecast or the article are false. In addition, defendants deny knowledge of any falsity that may be present, or that they proceeded with reckless disregard of

truth or falsity. Thus defendants, as they are of course entitled to do, cast upon Herbert the onerous burden of proof that applies in cases of this nature, as summarized recently by the Second Circuit in Buckley v. Littell, 539 F.2d 882, 889-890 (2d Cir. 1976):

> "The appellee, a public figure, must rather have demonstrated with convincing clarity not only that the appellant's statements were false, but that appellant knew they were false or made them with reckless disregard of their truth or falsity."

II.

Herbert has launched extensive pre-trial discovery, including the taking of depositions of the defendants and notices to produce documents pursuant to Rule 34. Numerous disputes arose, both in respect of answering questions on depositions and producing documents. Counsel for the parties worked effectively and in a good spirit of cooperation to narrow the areas of dispute. Additional issues were resolved by the Court following a hearing. At that hearing, the remaining areas of dispute were reserved for decision, following the submission by counsel of further memoranda. Those remaining disputes will be considered in this opinion.

III.

Many of the issues arise out of the deposition of defendant Lando, the producer of the 60 MINUTES telecast and the author of the Atlantic article. Upon a number of occasions,

counsel for Lando instructed him not to answer questions posed by counsel for Herbert. Herbert now seeks an order compelling answers to those questions.

The questions involved are numerous, and will not be set forth here. They may for convenience be separated into areas of inquiry, which the main brief for defendants CBS, Wallace and Lando (p.2-3) accurately summarizes as follows:

> "1. Lando's conclusions during his research and investigation regarding people or leads to be pursued, or not to be pursued, in connection with the '60 Minutes' segment and the Atlantic Monthly article;
>
> "2. Lando's conclusions about facts imparted by interviewees and his state of mind with respect to veracity of persons interviewed;
>
> "3. The basis for conclusions where Lando testified that he did reach a conclusion with respect to persons, information or events;
>
> "4. Conversations between Lando and Wallace about matter to be included or excluded from the broadcast publication;
>
> "5. Lando's intentions as manifested by the decision to include or exclude material;
>
> "6. Conversations between Lando and source persons subsequent to the inception of this action;
>
> "7. Lando's activities as well as conversations between Lando, Wallace and/or other CBS employees concerning Herbert or the '60 Minutes' segment between broadcast and publication of the Atlantic Monthly article."

In addition, disputes exist with respect to Herbert's following discovery demands:

1. Production of a CBS memorandum prepared by a CBS "house" attorney in response to an inquiry made by Lando, under circumstances to be discussed below.

2. Questions and demands concerning communications between Atlantic and its counsel involving Lando's manuscript and the article which ultimately appeared in Atlantic.

3. Herbert also demands production of documents in the possession of CBS, Wallace or Lando during stated periods of time, regarding Herbert, the 173rd Airborne Brigade while in Viet Nam, individuals appearing or referred to on the 60 MINUTES segment, and the events described in Herbert's book "Soldier", and documents relating to communications or correspondence with Herbert's literary agent, the publishers of his book, and employees of Atlantic concerning Herbert, his charges, the truth and accuracy of the 60 MINUTES segment, or any individual appearing or quoted thereon. The particular area of dispute in respect of this documentation concerns production of such documents that were in the possession of the parties indicated at the stated times, but which were not specifically known to Wallace or Lando at the time the telecast was being produced.

These areas of dispute will be considered in order. Preliminarily, however, it is necessary to consider in greater detail what plaintiff must prove in order to recover. That question is inextricably interwoven with the proper boundaries of pre-trial discovery.

IV.

Defendants rely upon their First Amendment guarantee of the freedom of speech, with particular reference to "public figures". In Goldwater v. Ginzburg, 414 F.2d 324, 335 (2d Cir. 1969), the Second Circuit stated succinctly:

> "False statements are protected only if they are honestly made."

That is a distillation of the Supreme Court's holding in Garrison v. Louisiana, 379 U.S. 64-75-6 (1964):

> "Hence the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection."

Thus there are two kinds of statements that are not protected:

(1) the knowingly false statement; and

(2) the false statement made with reckless disregard of the truth.

These constitutionally unprotected creatures are obviously of different species. Knowledge of falsity is a necessary element of the first; that is not so in respect of the second. Identification of the first species turns upon an objective question of fact: did the defendant know the statement was false? Either he did or did not; if he did he is cast in damages; if he did not he is exonerated.

The second species of unprotected false statement is at once more subtle, complex and subjective. The concept of "reckless disregard for truth" inevitably carries the trier of the facts into the thought processes of the defendant: the evaluation and balancing he made of conflicting information available to him; the misgivings he may have suppressed when deciding to publish.

Thus the Supreme Court has defined false statements made in "reckless disregard for truth" as those made with "a high degree of awareness of their probable falsity", Garrison v. Louisiana, supra, at 74. Mr. Justice Harlan's opinion in Curtis Publishing Co. v. Butts, 388 U.S. 130, 153 (1967) speaks of publication "despite the publisher's awareness of probable falsity." In St. Amant v. Thompson, 390 U.S. 727, 731, 732 (1968), Mr. Justice White said that reckless disregard is present if the publisher "in fact entertained serious doubts as to the truth of his publication", or where "there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports". In Gertz v. Robert Welch, Inc., 418 U.S. 323, 334 n. 6 (1974), the Court noted that the St. Amant test "equated reckless disregard of the truth with subjective awareness of probable falsity..."

Whether or not the present defendants "entertained serious doubts" as to the truth of the statements about Herbert, or had a "subjective awareness of probable falsity", are questions of crucial relevance. No one disputes that. The question is

how a plaintiff in Herbert's position proves such elements as doubt or awareness in the minds of the defendants—or, to be more precise within the context of the present motion, what discovery procedures he may legitimately summon to his aid.

V.

The Court observed at the beginning of this opinion that the question presented is, in substantial part, one of first impression. That is because, with a sole exception, the defamation cases cited in the briefs of counsel deal with the totality of the evidence adduced on the merits. That is to say, these cases arise on motions for summary judgment, or on motions or appeals after trial. Only one case focuses upon the appropriate boundaries of discovery within the context of a "public figure" defamation suit, and it is limited to discovery of documents.

That case is Buckley v. Vidal, 50 F.R.D. 271 (S.D.N.Y. 1970), a decision by Judge Levet of this court. Plaintiff alleged that he had been defamed by the defendant's statements in television programs, and in articles appearing in magazines. The plaintiff sought production, under Rule 34, of a wide variety of manuscripts, correspondence, notes, memoranda and other material prepared by defendant or exchanged between defendant and the magazines and television station in question, editors, agents, or employees, or persons engaged as investigators by the defendant, or relating in any manner to the statements in suit. The defendant interposed First Amendment objections; and also argued that plaintiff had

failed to show "good cause" for the production, and that certain of the documents were covered by the attorney-client privilege.

Judge Levet overruled the first two objections, and reserved his ruling on the third for an in camera examination of the documents as to which privilege was asserted. On the First Amendment point, he commented on the heavy burden of proof borne by a plaintiff in such cases, and viewed that burden as a basis for liberal pre-trial discovery:

> "In the case at bar, it seems that plaintiff is obligated to delve into the realm of defendant's conduct, motivation and belief in order to recover, at least with regard to statements directed to public conduct of the plaintiff.
>
> "Although in recent years the Supreme Court has placed stringent burden of proof requirements on a public official or public figure suing for defamation, such plaintiffs may still recover if they sustain their heavy burdens. As long as a cause of action for defamation passes constitutional muster, a plaintiff must be allowed reasonable opportunity for discovery. Defendant's objection to production and inspection on broad First Amendment grounds is therefore overruled." 50 F.R.D. at 273-4.

On the "good cause" objection, the court said, in directing disclosure of material received by defendant concerning plaintiff for a period of six years prior to the publications in suit:

> "In light of the nature of this action and the burden of proof that may be imposed on plaintiff, as discussed above, I do not believe the 1962 date is too remote." 50 F.R.D. at 274.

In keeping with the rationale of Buckley v. Vidal, I conclude that a "public figure" plaintiff in a defamation action is entitled to liberal interpretation of the rules concerning pre-trial discovery. I intimate no view on the merits of the present case; but one cannot close one's eyes to the possibility of malicious publications or statements concerning public figures. If the malicious publisher is permitted to increase the weight of the injured plaintiff's already heavy burden of proof by a narrow and restricted application of the discovery rules, so that the plaintiff is denied discovery into areas which in the nature of the case lie solely with the defendant, then the law in effect provides an arras behind which malicious publication may go undetected and unpunished. Nothing in the First Amendment requires such a result.

There is another general principle applicable to this case in its present stage of development. Defendants argue in their briefs that many of the areas into which Herbert wishes to inquire would not constitute admissible evidence, in the light of the pertinent cases. Some of these contentions are considered further infra. But it may be noted generally that, under Rule 25(b)(1), F.R.C.P.:

> "It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

Courts have given a broad scope to this language, which was added to the Rule by amendment. 4 Moore's Federal Practice (2d ed. 1976), ¶26.56[5] at p. 26-179. Judge Lumbard, concurring in

United States v. Matles, 247 F.2d 378, 383 (2d Cir. 1957), rev'd on other grounds, 356 U.S. 256, said:

> "This language [Rule 26(b)] is clearly designed to be broad enough to cover almost anything that will help the examining party to discover any leads to evidence."

It is, of course, true that the matter as to which discovery is sought be "relevant" to the subject matter of the action. In the light of these principles, I turn to the particular areas of dispute.

VI.

The first five areas of dispute, listed on page 6 supra, relate to Lando's conclusions, opinions and intentions, formulated during the period of time that he was researching and preparing the television program and the Atlantic article, with particular reference to people or leads to be pursued or not to be pursued, the veracity of persons interviewed, and the reasons why certain material was included or excluded. Lando was repeatedly instructed by counsel not to answer such questions during his deposition (the inquiries in question appear in Appendix A to defendants' main brief).

Defendants interpose a broad-scale objection to these lines of inquiry. They contend that inquiry into opinions, conclusions, the basis of conclusions, and intent cannot be permitted because it is irrelevant, constitutes a violation of First Amendment privilege and also the privilege of "editorial judgment".

I reject these contentions. Where, as here, the defendant's state of mind is of central importance to a proper resolution of the merits, it is obvious that these lines of inquiry may lead, directly or indirectly, to admissible evidence. As in all cases, civil or criminal, turning upon the state of an individual's mind, direct evidence may be rare; usually the trier of the facts is required to draw inferences of the state of mind at issue from surrounding acts, utterances, writings, or other indicia. In Goldwater v. Ginzburg, 414 F.2d 324, 342 (2d Cir. 1969), cert. den., 396 U.S. 1049, the Court made this point forcibly in considering the trial judge's charge:

> "The trial court, appellants also argue, erroneously permitted the jury to find actual malice from evidence of negligence and ill will. The record is to the contrary. The court below not only charged the jury but also emphasized in the charge that neither negligence nor failure to investigate, on the one hand, nor ill will, bias, spite, nor prejudice, on the other, standing alone, were sufficient to establish either a knowledge of the falsity of, or a reckless disregard of, the truth or falsity of the materials used. Moreover, the court properly instructed the jurors that they should consider all the evidence concerning appellants' acts and conduct in publishing Fact in deliberating upon whether the defendants published with actual malice. There is no doubt that evidence of negligence, of motive and of intent may be adduced for the purpose of establishing, by cumulation and by appropriate inferences, the fact of a defendant's recklessness or of his knowledge of falsity. See, e.g., Curtis Publishing Co. v.Butts, supra." (emphasis added).

The publisher's opinions and conclusions with respect to veracity, reliability, and the preference of one source of information over

another are clearly relevant. It is no answer for the defendants to say that they accurately repeated the words of certain of their interviewees. In Goldwater v. Ginzburg, supra, the Second Circuit observed:

> "Repetition of another's words does not release one of responsibility if the repeater knows that the words are false or inherently improbable, or there are obvious reasons to doubt the veracity of the person quoted or the accuracy of his reports. St. Amant v. Thompson, supra at 732, 88 S.Ct. 1323." 414 F.2d at 337 (emphasis added).

The lines of inquiry under discussion are entirely appropriate to Herbert's efforts to discover whether Lando had any reason to doubt the veracity of certain of his sources, or, equally significant, to prefer the veracity of one source over another. It is quite apparent that Col. Herbert, at the times in question, was a controversial figure, highly regarded in certain quarters, but viewed with considerably less favor in others. Herbert is entitled to full discovery on these lines of inquiry. He is equally entitled to discovery on whether Lando's investigation and research was negligent, and the lines of inquiry under consideration bear upon this issue as well. Nothing in the Times case or its progeny holds that evidence of negligence can never be relevant or admissible on the issue of malice. The Second Circuit also makes this clear in Goldwater v. Ginzburg:

> "As already stated, supra, Times does not hold that evidence of negligence is inadmissible; it only holds that evidence which

> merely establishes negligence in failing to discover misstatements, without more, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct. Recklessness is, after all, only negligence raised to a higher power. To hold otherwise would require that plaintiff prove the ultimate fact of recklessness without being able to adduce proof of the underlying facts from which a jury could infer recklessness. It would limit successful suits to those cases in which there is direct proof by a party's admission of the ultimate fact, certainly a situation not intended by the Supreme Court. See St. Amant v. Thompson, supra, 390 U.S. at 732-733, 88 S.Ct. 1323." 414 F.2d at 343.

See also Time, Inc. v. Hill, 385 U.S. 374 (1967), and in particular the discussion under Point II, pp. 391-4, in which the Supreme Court considers the sort of activities, evaluations and opinions on the part of a publisher or its representatives which could permit the trier of the fact to draw the inference of reckless disregard of truth.

Finally, under this heading, I find no substance in the argument defendants base upon the "editorial judgment" concept. Cases such as Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974) and Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1973), deal with statutes or regulations purporting to specify what newspapers or broadcasting stations must print or say. Branzburg v. Hayes, 408 U.S. 665 (1972), deals with a newspaper reporter's obligation to respond to a grand jury subpoena and inquiry. These cases have nothing to do with the proper boundaries of pre-trial discovery in a

defamation suit alleging malicious publication.

VII.

Items 6 and 7 of the disputed issues (p. 6 supra) relate to conversations between Lando and source persons subsequent to the inception of the action; and to Lando's activities as well as conversations between Lando, Wallace or other CBS employees concerning Herbert or the television program, between broadcast and publication of the Atlantic Monthly article.

Defendants object to these lines of inquiry on the basis that inquiry into post-publication activities, writings or statements is irrelevant, and cannot possibly lead to the discovery of admissible evidence.

I cannot accept this latter proposition. As noted above, the case turns upon subjective aspects of the defendant's state of mind. To be sure, it is the state of mind at the time of publication that controls; but how can it reasonably be contended that post-publication statements or activities could not form the basis for an inference as to pre-publication state of mind? I do not say that such evidence will be adduced; I only hold that, under the discovery rules, Herbert is entitled to inquire. It is well settled that statements after the act, stating the past intent or motive at the time of the act, are usable against a defendant as admissions. 6 Wigmore on Evidence (3rd ed. 1940) at §1732, p. 103. See also Glasser v. United States, 315 U.S. 60 (1941) (alleged conspiracy on part of government

prosecutors and private counsel to defraud United States in respect of prosecution of liquor cases; evidence was admitted that a defendant, one Roth, asked an Assistant United States Attorney to use his influence to stop the investigation; this evidence held admissible: "The statements of Roth were not in furtherance of the conspiracy, but they did tend to connect Roth with it by explaining his state of mind." 315 U.S. at 82.) Compare United States v. Matot, 146 F.2d 197 (2d Cir. 1944) (in prosecution for bank fraud, where fraudulent intent was a necessary element of the crime, held it was error to exclude evidence of accused's subsequent interview with bank president, since conversation could be read as "confirmation of his denial that he had ever contemplated a fraud," 146 F.2d at 198).

Furthermore, in the case at bar defendant Lando was directly concerned with two publications: the television broadcast on February 4, 1973, and the Atlantic article in May, 1973. Obviously, the activities of Lando during this interim period of time are relevant. In Airlie Foundation, Inc. v. Evening Star Newspaper Co., 337 F.Supp. 421 (D.D.C. 1972), the court considered a several-publication libel suit. The court noted the possibility that "the publisher's initial evaluation of his story and his decision to publish will be undercut by subsequent developments." The court in Airlie recognized that, under Supreme Court holdings, later events "may have no probative value as they relate to earlier publications", citing Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 55 (1971); and that information

revealed after the first publication, insofar as it bears on the publisher's investigative efforts, need not necessarily be taken as evidence of malice, citing the Times decision at 376 U.S. 287. But the court went on to observe, in a discussion which illuminates the considerations pertinent to the present case:

> "But while it is well established that a failure to investigate, without more, is insufficient to give rise to liability, once one has undertaken to conduct an investigation he should not be permitted to ignore with impunity the fruits of that investigation...
>
> "Here the defendant attempted to obtain confirmation or denial of the charges from the Director of the CIA after initial publication. The Star's editor testified that he received an emphatic denial, one which, in his own words, left him 'considerably shaken.' Nevertheless, the Star again published an account of the Higgs press conference the following day. While the headline featured Dr. Head's denial, the text included several details not raised by Higgs, including, among others, the CIA refused to comment. Faced with this testimony and evidence there was a basis established with convincing clarity upon which the jury might well have concluded these details were known by the Star to be false and were added by it to lend credence to the Higgs charges at a time when it entertained serious doubts as to the validity of those charges. Accordingly, the Court concludes that the evidence was sufficient to go to the jury on the question of whether the Star published 'with knowledge that it was false or with reckless disregard of whether it was false or not' as required by the New York Times case." 337 F.Supp. at pp. 427-8

Again, I of course express no view as to whether Herbert will succeed in developing any useful evidence as the result of post-publication inquiry. I hold only that he is entitled to

such inquiry under the discovery rules.

VIII.

The next disputed item involves a CBS memorandum prepared by one of its "house" attorneys under the following circumstances.

During his deposition, Lando testified that sometime after the broadcast Col. Franklin telephoned him. Franklin told Lando he was contemplating an action against Herbert, and asked if his (Franklin's) attorney could talk to Lando. Lando replied that he did not know; he would "have to check with CBS to see" (722). Lando testified:

> "The information that I conveyed to CBS was that Franklin's attorney had contacted me -- by that time Franklin had contacted me, told me he was bringing suit over the book, and wanted to know if I would speak to his attorney to give him information. I believe that is what I relayed to CBS." (725).

Lando's inquiry produced the document under consideration. It is a memorandum dated July 17, 1973, written by Michael J. Goldey, an attorney on the staff of the CBS Law Department. The memorandum was addressed to (1) David Klinger, Vice President and Assistant to the President of CBS News, and in charge of liaison between the Law and News Departments; (2) Don Hewitt, the executive producer of the 60 MINUTES program; and (3) Joseph M. Walsh, the General Attorney, Publishing, with initial responsibility for rendering legal advice on matters relating to CBS's

publishing operations. Copies of the memorandum were sent to John D. Appel (Deputy General Counsel), Ralph E. Goldberg (General Attorney for Governmental Affairs), and Lando.

The thrust of the memorandum, Lando testified, was "that my position would be that there would be no contact, no information given to Franklin or his attorney for this suit" (724). Accordingly Lando advised Franklin's attorney that "I could not give them any information whatsoever" (722).

CBS, Lando and Wallace invoke the attorney-client privilege in respect of this memorandum. Herbert contends that, in the circumstances of the case, the privilege either does not apply or has been waived.

I start with the observation that the memorandum in question is a communication from an attorney to a client,[1] and not from a client to an attorney. The distinction is significant, because of the rationale underlying extension of the privilege to the attorney's communications. "The reason for it", says Wigmore,[2] "is not any design of securing the attorney's freedom of expression, but the necessity of preventing the use of his statements as admissions of the client, or as leading to inferences of the tenor of the client's communications..."

In United States v. Silverman, 430 F.2d 106 (2d Cir. 1970), cert. den., 402 U.S. 953 (1971), the Second Circuit held that no privilege attached to minutes delivered by a client to its attorney, because the minutes were a matter of public record. The court applied and interpreted Wigmore's analysis:

> "The privilege as commonly formulated refers to a confidential communication from the client to the attorney. 8 Wigmore, Evidence §2292 (McNaughton rev. ed. 1961); compare Uniform Rule of Evidence 26 ('between lawyer and his client'). Wigmore states that the reason for bringing communications from the attorney to the client within the privilege is to prevent adopted admissions or inferences of the tenor of the client's communication. 8 Wigmore, Evidence §2320 (McNaughton rev. ed. 1961). The purpose of the privilege, the encouragement of full disclosure to the attorney in procuring legal advice, implies that a communication from an attorney is not privileged unless it has the effect of revealing a confidential communication from the client to the attorney." 430 F.2d at 122 (emphasis added).

Judge Moore's opinion quotes with approval this discussion from United States v. United Shoe Machinery Corp., 89 F.Supp. 357, 359 (D.Mass. 1950):

> "'It follows that in so far as these letters to or from independent lawyers were prepared to solicit or give an opinion on law or legal services, such parts of them are privileged as contain, or have opinions based on, information furnished by an officer or employee of the defendant in confidence and without the presence of third persons. * * *
>
> "'However, * * * there is no privilege for so much of a lawyer's letter, report or opinion as relates to a fact gleaned from * * * a public document such as a patent, cf. Edison Electric Co. v. United States Electric L[ighting] Co., [44 F. 294 (C.C.S.D.N.Y. 1890)].'" (emphasis added).

Another statement of the underlying rationale appears in Georgia-Pacific Plywood v. United States Plywood Corp., 18 F.R.D. 463, 464 (S.D.N.Y. 1956):

> "Since communications by the attorney to the client might reveal the substance of a client's communication they are also within the privilege." (emphasis added).

In United States v. International Business Machines Corp., 66 F.R.D. 206 (S.D.N.Y. 1974), Chief Judge Edelstein reviewed these authorities and concluded:

> "In light of the clear guidance from the Second Circuit on this matter and because the approach recommended by the Masters coincides with the purpose of the attorney-client privilege, this court is constrained to reject defendant's formulation of the attorney-client privilege as it applies to communications from lawyers to their clients. This court will abide by the view that such communications are privileged only to the extent that they reveal confidential information communicated by the client to the lawyer. Accordingly, the proper focus of the Masters' inquiry must be whether or not the document as to which privilege is claimed can be said to reveal such a communication." 66 F.R.D. at 212 (emphasis added).

Applying these principles to the case at bar, it is apparent that certain difficulties arise with respect to defendants' claim of privilege. The memorandum in question does not automatically achieve privileged status because its author was an attorney. Nor is privileged status automatically conferred by the fact that the memorandum may express an opinion of counsel; opinions are privileged only to the extent that they are based upon, and consequently reveal, information furnished by the client in confidence.

In the case at bar, it is somewhat difficult to see how Lando's inquiry, prompted by the telephone call from Col. Franklin, can be viewed as "confidential information communicated by the client to the lawyer", United States v. International Business Machines Corp., supra. It is not even certain that Lando directed his inquiry to one of the CBS legal staff; he speaks only in terms of conveying the information of Franklin's request "to CBS". But we may assume that Lando directed his inquiry to a member of the legal staff; in any event, the question ultimately found its way there, and was apparently dealt with by Mr. Goldey. But the question remains: How can it be said that disclosure of the memorandum would have "the effect of revealing a confidential communication from the client to the attorney", in the words of United States v. Silverman, supra? Lando's communication has already been revealed in his deposition testimony: "Franklin is thinking of suing Herbert, and wants me to talk to his attorney -- shall I do it?" Revelation of that inquiry having already been accomplished, there is no basis for contending that the responsive memorandum is privileged because it might tend to reveal the inquiry.

It may be, however, that the contents of the memorandum contain information, comments, or opinions which are based upon or reveal confidential communications addressed to counsel by other CBS officers or employees. The Court cannot determine this question without examining the document. Accordingly, counsel for the defendants are directed to furnish the Court

with a copy for inspection in camera. There is ample authority for proceeding in that manner. See In Re Grand Jury Subpoena Duces Tecum, 391 F.Supp. 1029, 1033 (S.D.N.Y. 1975).

Herbert also argues that the memorandum is beyond the scope of the attorney-client privilege because (a) it deals with business advice, rather than legal advice; and (b) Lando is not within the "control group" of CBS employees, so that, at the very least, the forwarding of a copy of the memorandum to him waived the privilege. I reject these arguments. Lando's inquiry was clearly intended to evoke legal, not business or professional, advice. Franklin contemplated litigation against Herbert; Lando was asked to confer with Franklin's attorney; the Legal Department of CBS took the question under advisement. Potential lawsuits and actual attorneys were in the air; this is the atmosphere within which counsel live, move, and have their being. It is unreasonable to characterize the incident as one involving business or professional advice. As for the "control group" contention, giving full force to that line of authority and assuming without deciding that Lando falls outside the group, the individuals to whom the memorandum was addressed clearly fall within the group, and I decline to hold that the receipt by Lando of a copy constitutes a waiver binding upon all defendants, individual and corporate.

IX.

The discovery disputes between Herbert and the defendant Atlantic concern the following two items:

(1) Herbert's request for discovery of Atlantic's communications with its counsel on the subject of the Lando article printed in Atlantic in May, 1973, such communications having taken place prior to publication; and

(2) Herbert's request for discovery of Atlantic's internal communications and communications with Lando, subsequent to the receipt by Atlantic of a "bill of discrepancies" prepared by Herbert's literary agent, one Gerard McCauley, and sent to Atlantic more than four months after publication.

These disputes are considered in order.

While the subject of pre-publication communications between Atlantic and its attorney, Conrad Oberdorfer, Esq., of the firm of Choate, Hall & Stewart in Boston, has generated considerable discussion in the briefs, it would appear that we are concerned with only one communication. It appears from the affidavit of Robert Manning, the Editor-in-Chief of Atlantic, that on March 9, 1973 he received a letter from Mr. Oberdorfer. Mr. Oberdorfer wrote to Manning, presumably in response to the latter's prior request, in order to give his advice on the proposed Lando article, and to recommend that Manning raise certain questions about the article with Lando. Manning sent Oberdorfer's letter on to Lando for his comments.

The forwarding by Atlantic of counsel's letter to Lando, of course, waived any attorney-client privilege that might otherwise have obtained; and Atlantic has quite properly produced the March 9 Oberdorfer letter to Manning, and Atlantic's forwarding letter of March 13 to Lando, for inspection by Herbert. Manning's affidavit recites that, apart from these two letters, "Atlantic had only one communication with its attorney during the pre-publication period. This was a brief letter from Atlantic to Mr. Oberdorfer during the period before Oberdorfer's March 9, 1973 letter." The Court has no basis to doubt Mr. Manning's sworn statement, and plaintiff suggests none. Accordingly this area of dispute appears to be limited to that one "brief letter" from Atlantic to its counsel, written before the March 9, 1973 letter from counsel to Atlantic which has already been produced.

There is substantial authority for the proposition that voluntary disclosure of privileged matter to a third party waives the privilege, at least with respect to the particular subject matter involved in the disclosure.

In In Re Penn Central Commercial Paper Litigation, 61 F.R.D. 453, 464 (S.D.N.Y. 1973), this court said in an opinion by Chief Judge Edelstein:

> "The theoretical predicate underlying all recognized privileges is that secrecy and confidentiality are necessary to promote the relationship fostered by the privilege. Once the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party, the rationale for granting the privilege in the first instance no longer applies."

The court added that "a claim of privilege cannot be selectively waived", citing, among other cases, Lee National Corp. v. Deramus, 313 F.Supp. 224 (D.Del. 1970), in which the court held that a party's free and voluntary revelation of otherwise privileged communications with its counsel on a particular subject matter (by-law and charter amendments) constituted a waiver of the attorney-client privilege with respect to that particular subject matter. The court observed:

> "Fairness demands that all occasions when this subject matter was discussed with counsel be revealed." 313 F.Supp. at p. 227.

In the case at bar, Atlantic requested counsel's advice in respect of the intended Lando article. Counsel's response, in the form of the March 9, 1973 letter, was then voluntarily disclosed by Atlantic to a third party, namely, Lando. Assuming arguendo that the March 9 letter was originally privileged, the privilege was lost by disclosure to Lando. It follows that any pre-publication communications between Atlantic and its counsel on that particular subject matter are no longer protected by the privilege. If the pre-March 9 "brief letter" from Atlantic to counsel deals with the same subject matter as the March 9 letter, then the prior letter must be revealed.[3] In order that a proper determination may be made, I direct that the Court be furnished with a copy of the letter in question for examination in camera.

The post-publication discovery disputes involving Atlantic turn upon quite different facts. Printed copies of the May, 1973 issue of the Atlantic magazine became available in mid-April. It appears from the affidavit of C. Michael Curtis, an associate editor of Atlantic, that copies of the issue were sent, as soon as they became available, on April 17, 1973 to Herbert, his literary agent McCauley, and certain other individuals. Atlantic took this action because of a prior request it received from McCauley, in the latter part of March, 1973, McCauley having evidently learned of the intended Lando article, and having asked if Atlantic could print a reply by Herbert in the same issue. Curtis had advised McCauley that such an arrangement could not be made.

Ultimately, McCauley forwarded to Curtis, as an enclosure to a letter dated August 16, 1973, a typed list of 27 "discrepancies" in connection with the Lando article which appeared in Atlantic. These "discrepancies" consist, in sum, of Herbert's points of disagreement with factual assertions in the Lando article. This document was accompanied by 44 pages of documentation intended to support Herbert's position. McCauley's forwarding letter to Curtis describes the enclosure as "a list of 27 items which seem to contradict Barry Lando's article"; the letter concludes:

> "...I look forward to receiving some response from The Atlantic."

The Curtis affidavit says:

> "Upon receipt of the 'bill of discrepancies', I sent copies both to defendant Barry Lando, the author of the article, and to Atlantic's counsel, and discussed it with other editors at the Atlantic. This was followed by communications back and forth, primarily in writing, concerning Herbert's charges as itemized by McCauley and the way in which those charges might be met. It is such communications, undertaken when we knew that litigation was likely, and with a view to deciding how we should answer plaintiff's charges, that plaintiff now seeks to discover."

As appears from the Curtis affidavit, Atlantic takes the position that the Herbert list of discrepancies was compiled by Herbert in anticipation of suing Atlantic, so that Atlantic's subsequent communications, prompted by the Herbert list, are vested, in addition to customary attorney-client privilege, with the protection afforded by Rule 26(b)(3), F.R.C.P.

Herbert denies that his list of discrepancies was prepared at a time when he was contemplating litigation against Atlantic. He ascribes to other reasons the fact that he did not reply to the Atlantic article until four months after Atlantic had sent him a copy (Atlantic relies upon this delay as evidence of Herbert's intention to litigate, rather than to obtain a correction from Atlantic).

I conclude, without undue difficulty, that the communications referred to were made "in anticipation of litigation", as that phrase is used in Rule 26(b)(3). Of course, it is not decisive on the issue that Col. Herbert had not yet commenced suit against Atlantic. In the landmark case of Hickman v. Taylor, 329 U.S. 495,

511 (1947), the Supreme Court stated that the work-product privilege extends to those documents prepared "with an eye toward litigation". This court has said, in Stix Products, Inc. v. United Merchants & Manufacturers, Inc., 47 F.R.D. 334, 337 (1969):

> "If the prospect of litigation is identifiable because of specific claims that have already arisen, the fact that, at the time the document is prepared, litigation is still a contingency has not been held to render the privilege inapplicable."

Herbert's list of discrepancies, while not referring specifically to an intent to litigate, may certainly be regarded as "specific claims" that he caused to arise in respect of the Lando article. Professor Wright reminds us:

> "Prudent parties anticipate litigation, and begin preparation prior to the time suit is formally commenced. Thus the test should be whether, in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." 8 Wright and Miller, Federal Practice and Procedure (1970) at §2024, p. 198.

Herbert's communication to Atlantic clearly gave rise to the "prospect of litigation", and it would have been imprudent for Atlantic to conclude otherwise. Communications may be characterized as having been carried on "with an eye toward litigation", even though they were prompted by a desire to avoid, and not prepare

for, a possible suit. Vilastor-Kent Theater Corp. v. Brandt, 19 F.R.D. 522 (S.D.N.Y. 1956). While a showing of a "remote possibility of litigation" is not sufficient to invoke Rule 26 (b)(3), Garfinkle v. Arcata National Corp., 64 F.R.D. 688, 690 (S.D.N.Y. 1974), I conclude that the present case cannot be so characterized. This is so, even accepting Herbert's statement that "in going over the errors in Lando's article with McCauley", he did not contemplate a lawsuit at that time. The seeds of prospective litigation had been sown; they ultimately came to fruition; and I cannot agree with plaintiff that, once Herbert's communication had been received by Atlantic, the prospects of the litigation which eventually came to pass were so remote that the Rule does not apply.

However, that is not an end of the inquiry. Rule 26(b)(3) permits discovery of "documents and tangible things" covered by the Rule, upon a showing by the party seeking the discovery that he "has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means."[4] The only mandatory protection afforded by the Rule appears in its last sentence, which directs the trial court to "protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

I hold that, in the circumstances of this case, Herbert has made the requisite showings of need and hardship. While

Atlantic argues that post-publication communications cannot possibly be relevant, I have reached a contrary conclusion with regard to the other defendants' comparable argument (see Point VII, supra), and reach the same conclusion here. In this regard, I cannot wholly accept Atlantic's characterization of itself as nothing but a "conduit" through which Lando was expressing his views. The article, Exhibit B to the complaint, is entitled: "The Herbert Affair, by Barry Lando". The article is prefaced, however, by the following paragraph, presumably the "work product" of an Atlantic editor, and not Lando:

> "He seemed to be the perfect soldier, a hero in Korea and in Vietnam. Then he was driven out of the Army, his career ruined because he tried to prevent his superiors from concealing war crimes against the Vietnamese. That was the story a television producer persuaded his superiors at CBS should be presented to a nationwide audience. As the producer and his associates began assembling the facts, they found it changing into a very different story, one that left the reporter disillusioned and the hero threatened with decanonization. The producer here tells how the case unfolded for him, from his first, convincing interviews with Lieutenant Colonel Anthony Herbert, through intensive researching of Herbert's alarming charges against fellow Army officers, to a dramatic confrontation between Herbert and some of those who disputed him on the CBS program, Sixty Minutes, shown on February 4 of this year. It is a tangled story, to say the least. One of its lesser anomalies: Herbert's book Soldier, now profitably riding the best-seller list, is published by Holt, Rinehart and Winston, which is owned by CBS, the organization that has done the most to attack the book's integrity."

While perhaps stopping short of placing its own imprimatur upon

the truth of Lando's assertions, Atlantic's references to "intensive researching" by Lando which "left the reporter disillusioned and the hero threatened with decanonization" may have served to give that impression. In any event, it is apparent that post-publication communications, involving Atlantic and other members of its corporate family, or Atlantic and Lando, may lead to the discovery of admissible evidence on the issue of pre-publication state of mind, on the part of both Lando and the Atlantic editors.

In consequence, the Court's ruling on this aspect of the case is that counsel for Atlantic are to submit to the Court all pertinent documents for in camera inspection, so that the protection mandated by the last sentence of the Rule can be assured. In respect of any continued or future oral depositions, counsel for plaintiff are directed not to inquire in respect of "the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative" of Atlantic "concerning the litigation"; and Atlantic's witnesses are not obliged to answer such questions if asked.

X.

The final area of dispute relates to Herbert's demand for production of:

> "...documents in the possession of CBS news, Wallace or Lando during the period June 1, 1971 to February 4, 1973 (to May, 1973 in regard to Lando) regarding Col. Herbert, the

> 173rd Airborne Brigade while in Vietnam, individuals appearing or referred to on the 60 MINUTES segment and events described in Soldier...which were not specifically known to Wallace and Lando at the time the program was being produced."

Herbert's counsel contends that such documents, even if not specifically known to Wallace or Lando at the time of production of the telecast, nevertheless may lead to the discovery of admissible evidence relating to whether the defendants "published the charged libel in reckless disregard of its truth or falsity." (affidavit of counsel, para. 3).

The defendants contend that documents in the files of the corporate or individual defendants, of which the individual defendants were not aware at the time of publication, cannot possibly be relevant in respect of their state of mind at the time of publication. Particular reliance is placed upon New York Times v. Sullivan, supra, in which it was said:

> "Finally, there is evidence that the Times published the advertisement without checking its accuracy against the news stories in the Times' own files. The mere presence of the stories in the files does not, of course, establish that the Times 'knew' the advertisement was false, since the state of mind required for actual malice would have to be brought home to the persons in the Times' organization having responsibility for the publication of the advertisement. With respect to the failure of those persons to make the check, the record shows that they relied upon their knowledge of the good reputation of many of those whose names were listed as sponsors of the advertisement, and upon the letter from A. Philip Randolph, known to them as a responsible individual, certifying that the use of the names was authorized. There was testimony that the persons handling the advertisement saw

> nothing in it that would render it unacceptable under the Times' policy of rejecting advertisements containing 'attacks of a personal character'; their failure to reject it on this ground was not unreasonable. We think the evidence against the Times supports at most a finding of negligence in failing to discover the misstatements, and is constitutionally insufficient to show the recklessness that is required for a finding of actual malice." 376 U.S. at p. 287-8.

While this Court fully recognizes the impact of the Times decision, the particular language of the opinion must be considered within the context of the facts of the case. The alleged libel in Times consisted of a full-page advertisement that the newspaper carried, which included statements, some of them false, about police action allegedly directed against students who participated in a civil rights demonstration. The newspaper published the advertisement upon an order from a New York advertising agency acting for the signatory committee; the agency submitted the advertisement with a letter from A. Philip Randolph, chairman of the committee, and well known to the Times advertising acceptability department as a responsible person. Mr. Randolph certified that the persons whose names appeared on the advertisement had given their permission.

In the case at bar, the Herbert story did not come to CBS, Lando or Wallace unsolicited and through the mail. On the contrary, it was at Lando's initiative that the Herbert story came into being; he did the investigations; and CBS and Wallace, together with Lando, worked together in assembling and putting on the air the program which resulted from Lando's efforts.

This situation, in my judgment, is quite different from the fact situation presented in Times, which turned upon the question of whether members of the advertising department should have checked the files of the news department in respect of statements in an advertisement which had come, unsolicited and entirely without their own inquiry into the facts, to the attention of the advertising department.

In Goldwater v. Ginzburg, supra, the Second Circuit considered the contention of the defendants that the trial court erred in permitting the head of a public opinion survey organization to testify that the defendants did not use a valid method of conducting the poll of psychiatrists to which they referred in their unflattering article about Senator Goldwater. That evidence, the defendants argued, was irrelevant "for at most it would only tend to show that appellants were negligent pollsters." 414 F.2d at 343. The Second Circuit disagreed, observing that the Times case "does not hold that evidence of negligence is inadmissible; it only holds that evidence which merely establishes negligence in failing to discover misstatements, without more, is constitutionally insufficient to support the finding of recklessness required to establish actual malice from proof of less than prudent conduct." 414 F.2d at 343 (emphasis added).

As previously noted, Goldwater v. Ginzburg teaches that evidence of reckless disregard for truth must be viewed in its totality. Thus, as one of the elements in that case "tending to prove actual malice", the Second Circuit observed that "the

seriousness of the charges called for a thorough investigation but the evidence reveals only the careless utilization of slipshod and sketchy investigative techniques." 414 F.2d at 339.

If, as Goldwater v. Ginzburg indicates, the utilization of "slipshod and sketchy investigative techniques" can be considered as evidence of actual malice, then the question arises: Could the material sought by discovery lead to the development of such evidence? The concept is stated in terms of possibility, since that is the context within which requests for discovery must necessarily be viewed. The Court concludes that the question must be answered in the affirmative. Assume, for the sake of the discussion, that the CBS telecast contained false statements concerning Herbert, the falsity of which would have been demonstrated by documents then in possession of CBS, Lando or Wallace. The Times decision does not brand as inadmissible the failure of an investigatory reporter to consult the files of his own newspaper (or television news facility) before publishing a false and defamatory statement which examination of those files would have prevented.[5] Again, I do not say that such facts actually exist in the case at bar; but Herbert is entitled to inquire.

However, the scope of inquiry indicated by the affidavit of counsel for plaintiff, at para. 3, is unduly broad, and compliance would be too burdensome to the defendants to justify full compliance. Production is demanded of documents "regarding Col. Herbert, the 173rd Airborne Brigade while in Vietnam, individuals appearing or referred to on the 60 MINUTES segment, and events

described in Soldier." Quite obviously, there could be many references in the files to the Brigade's service in Vietnam which would have nothing to do with this litigation. That is equally true of events described in Col. Herbert's book. Plaintiff is entitled to discovery of such documents as might exist in the files, and which relate specifically to the contents of the telecast and the article in Atlantic.

For the guidance of counsel in implementing this opinion, I direct that documents in the following categories, existing in the indicated files at the indicated times, be produced:

1. Any documents prepared by, pertaining to or mentioning Herbert; John Barnes; Ross Franklin; John Douglas; a Col. Rector; Kenneth Rosenblum; Richard Heintz; Bruce Potter; Robert Stemmies; Michael Plantz; William Hill; James Grimshaw; John Bettorie.

2. Any documents pertaining to or mentioning the February 14, 1969 "St. Valentine's Day Massacre" in Viet Nam.

3. Any documents pertaining to or mentioning the presence or absence of Col. Franklin in Viet Nam on February 14, 1969, including references to individuals interviewed on that subject.

4. Any documents referring to the service of the 173rd Airborne Brigade in Viet Nam during Herbert's tour of duty there.

These categories are not intended to be all-inclusive. They are intended, however, to demonstrate that the defendants are not obligated to produce reams of material which have no

direct bearing upon the issues posed by the allegedly libelous publications.

XI.

Herbert also contends that Lando, during his deposition, failed to respond fully to questions which were not made the subject of objections. Since the hearing on this case, counsel for Herbert have withdrawn a number of demands that further answers be furnished. I have examined the remaining questions, and agree with plaintiff's counsel that the answers previously given do not entirely track with the questions. Presumably, as the result of this opinion, Mr. Lando will be deposed further. Plaintiff's counsel may, if they wish, again put the questions under consideration to Mr. Lando, and further answers will be required.

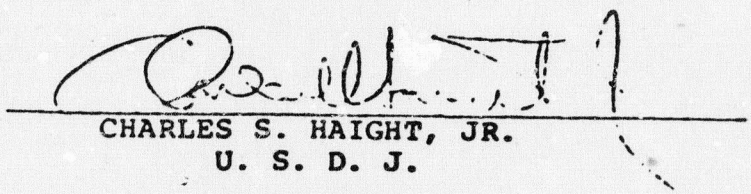
XII.

The foregoing constitutes the Court's order in this matter. I perceive no present need for the settlement of a further order. Counsel for the parties should be able to proceed in the case, in a manner consistent with this opinion and order. However, should the necessity for further applications arise, they may be addressed to the Court.

With respect to the documents that are to be furnished to the Court for inspection in camera, further rulings will be announced as soon as that process has been accomplished.

It is So Ordered.

Dated: New York, New York
January 4, 1977



CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. The attorney-client relationship extends to "house" counsel and members of the corporate control group. Burlington Industries v. Exxon Corp., 65 F.R.D. 26 (D.Ind. 1974).

2. 8 Wigmore on Evidence (McNaughton rev., 1961), §2320, p. 629.

3. See also Garfinkle v. Arcata National Corp., 64 F.R.D. 688, 689 (S.D.N.Y. 1974).

4. Rule 26(b)(3) provides in full:

> "Trial Preparation: Materials. Subject to the provisions of subdivision (b) (4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b) (1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation."

5. One may hypothesize a situation from another chapter of military history. Assume that, following Custer's defeat at the Little Bighorn, an investigative reporter for a leading newspaper researched the causes of the defeat, and wrote an article which his newspaper printed, which advanced the proposition that Major Reno withdrew, not as the result of Indian action, but because of the ill-advised order of one General X who was in the area and inserted himself into the chain of command. Assume further that, at the time of publication, the newspaper's files contained stories demonstrating that, when the battle occurred, General X was in Europe on a military mission. I cannot accept that, in General X's subsequent suit for defamation against the reporter and the newspaper, such a disregard of readily

available information would not be admissible as one possible indication, to be considered by the trier of the fact together with any other indicia, on the question of reckless disregard for the truth. (I am further assuming for this discussion that General X was a "public figure", and that the Times case and its progeny had been decided by the Supreme Court at the time of Custer's last stand.) The distinction lies, as the Second Circuit points out in Goldwater v. Ginzburg, supra, between the insufficiency of negligent investigation standing alone, and its admissibility into evidence as one factor among several, on the issue of reckless disregard. The present defendants argue, in essence, that because negligent investigation without more is not sufficient in law to establish reckless disregard, it cannot be considered, together with other elements, as part of the overall proof. That is a non-sequitur, and the missing link in the chain of logic is supplied neither by Times and its progeny nor the First Amendment.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

ANTHONY HERBERT, :

Plaintiff, : 74 Civ. 434-CSH

-against- : MEMORANDUM OPINION & ORDER

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY, :

Defendants. :

- x

HAIGHT, District Judge:

On January 4, 1977, this Court issued its Memorandum and Order determining certain questions that had arisen with respect to the proper scope of plaintiff's pre-trial discovery. Defendants Lando, Wallace and CBS now move this Court for certification of an interlocutory appeal, pursuant to 28 U.S.C. §1292(b).[1]

Plaintiff opposes certification. Defendant Atlantic Monthly Company takes no position on the question, because the issues sought to be raised by its co-defendants on the potential appeal do not involve Atlantic Monthly.

For the reasons appearing below, I grant the requested certification, and amend the Order of January 4, 1977 accordingly.

I.

This Court's Memorandum and Order of January 4, 1977 set forth in detail the nature of the case, and the issues presented

and resolved. For the sake of the following discussion, familiarity with that prior opinion is assumed.

In essence, this Court's prior Memorandum and Order granted to Lieutenant Colonel Herbert, a "public figure" plaintiff in a defamation action, the right to conduct pre-trial discovery, by means of oral depositions and discovery of documents, in areas which defendants Lando, Wallace and CBS strenuously contend are sacrosanct. Specifically, these defendants contend that such a plaintiff is not entitled to discovery in the area of what defendants refer to as their exercise of "editorial judgment".

As this Court observed in its original opinion, the proper breadth and scope of such a plaintiff's pre-trial discovery is a question of first impression, which must be determined within the context of considerations that arise out of New York Times v. Sullivan, 376 U.S. 254 (1964) and its progeny. Those considerations include: the scope of protection given by the First Amendment to publishers or other media who direct their attentions to "public figures"; the bases upon which such figures may hold publishers and media liable for defamation, notwithstanding that First Amendment protection; and the proper function of pre-trial discovery procedures, having in mind the plaintiff's bases of liability, the burden of proof he bears, and the defendant's First Amendment rights. In preparing its original Memorandum, the Court could find no case, and counsel cited no case, which considered the proper use of the full arsenal of pre-trial discovery weapons within this particular context. It was for that reason that the Court characterized

the basic issue decided as one of first impression.

II.

Plaintiff, resisting certification, contends that piecemeal appeals are disfavored in general, and that they are inappropriate to discovery orders in particular. There is substantial force to these contentions; however, interlocutory appeals on questions relating to discovery are by no means unknown. Thus, pre-trial discovery orders have been reviewed by writs of mandamus, Schlagenhauf v. Holder, 379 U.S. 104 (1964) (question involving validity and construction of Rule 35(a), F.R.Civ.P., providing for physical and mental examination of defendant in a negligence action), as well as by certification under 28 U.S.C. §1292(b), Carey v. Hume, 492 F.2d 631 (D.C.Cir. 1974), cert. dismissed, 417 U.S. 938 (1974) (order under Rule 37(a), F.R.Civ.P., compelling defendant newspaper reporter, in libel action, to disclose identity of eyewitness sources).

These cases teach us that, whereas interlocutory appeals from discovery orders may be rare, circumstances can arise which render them appropriate. Thus in American Express Warehousing, Ltd. v. Transamerica Insurance Co., 380 F.2d 277, 282 (2d Cir. 1967), the Second Circuit stated generally:

> "When a discovery question is of extraordinary significance or there is extreme need for reversal of the district court's mandate before the case goes to judgment, there are escape hatches from the finality rule: a certification by the district court under 28 U.S.C. §1292(b), apparently not sought here, or an extraordinary writ."

The American Express Warehousing case denied a writ of mandamus in respect of the district court's order directing the production of certain documents for discovery. Judge Feinberg's majority opinion, after reviewing the touchstones for mandamus review specified by the Supreme Court in Schlagenhauf, supra, denied mandamus because the district court had the power under the discovery rules to order production of the documents in question; there was no abuse of discretion in the order; and the district court's holdings:

> "...involve application of well-known law to commonplace fact, and rested on the district judge's appraisal of facts and exercise of discretion." 380 F.2d at p. 283.

In view of this latter consideration, Judge Feinberg concluded that an issue of first impression was not presented, as had been the case in Schlagenhauf.

In the case at bar, defendants seek to avail themselves of the alternative "escape hatch from the finality rule": certification under §1292(b). The statute sets forth its own touchstones. Certification is appropriate only if the district judge concludes that his opinion: (1) "involves a controlling question of law", (2) as to which there is "substantial ground for difference of opinion"; and that (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

In response to defendants' present motion, I must consider whether these three elements are present in the case at bar.

III.

"A Controlling Question of Law"

I have concluded that the validity or non-validity of defendants' contention that the concept of "editorial judgment" acts as a bar to discovery is of sufficient magnitude, both practical and theoretical, to rise to the level of "a controlling question of law."

As pointed out in this Court's prior opinion, and particularly at page 9, the Supreme Court has repeatedly held that a "public figure" plaintiff may recover in a defamation suit if he can establish that false statements were made in "reckless disregard for truth". The thrust of this Court's prior opinion is that, if "reckless disregard for truth" is a basis for liability, it necessaril follows that a plaintiff is entitled to discovery of the selective aspects of the editorial process; otherwise, he would never be able to prove (a) whether there had been "disregard" of available and accurate source material, and (b) whether such "disregard" could properly be characterized as "reckless". I believe my prior order to have been correct, and the discovery mandated thereby to be appropriate. If it is not, however, the practical consequences upon the plaintiff, in respect of preparing his case for trial and sustaining a heavy burden of proof, would appear to be so substantial as to approach an issue of controlling significance. Compare Garner v. Wolfinbarger, 430 F.2d 1093, 1097 (5th Cir. 1970) (certification under §1292(b) granted with respect to district

court's order denying availability of attorney-client privilege in suit by stockholders against corporation: "Review under §1292(b) is available where decision on an issue would affect the scope of the evidence in a complex case, even short of requiring complete dismissal"); Time, Inc. v. McLaney, 406 F.2d 565, 566 (5th Cir. 1969) (§1292(b) certification granted following denial of motion for summary judgment in libel suit; the Fifth Circuit, while recognizing the limited availability of interlocutory appeals, observed that: "The subject matter of this litigation, involving, as it does, the very serious and timely question of how far the First Amendment guarantee of freedom of the press may still be impinged upon by actions for libel, places some cases in a somewhat different category.")

Certification in the case at bar also seems indicated by the Second Circuit's discussion in Investment Properties International Ltd. v. IOS, Ltd., 459 F.2d 705 (2d Cir. 1972), granting mandamus in respect of the district court's vacating of plaintiff's notices of deposition. The court stated:

> "Judge Bonsal clearly had the power to vacate plaintiffs-petitioners' notices of deposition. Fed.R.Civ.P. 26(c)(1). Nevertheless, the issue here is one of first impression, and the vacation reveals, through its consequences, an abuse of discretion. Discovery here, furthermore, is not a matter of mere 'housekeeping,' see American Express Warehousing, Ltd. v. Transamerica Insurance Co., supra, 380 F.2d at 284, but is the heart of the controversy, for on it turns plaintiffs-petitioners' right to be in court. The order below makes it virtually impossible to discover the facts on which jurisdiction and standing turn, and thus puts the plaintiffs-petitioners in a cul-de-sac which the Federal Rules never contemplated." 459 F.2d at p. 707 (emphasis added).

While I recognize that Investment Properties arose out of a petition for mandamus, rather than certification under §1292(b), the practical considerations reflected in the language just quoted from Judge Oakes' opinion seem equally pertinent here.

It has been recognized that, in the light of the Schlagenhauf case, circumstances may arise where a precise question of law needs to be "decided by an advance supervisory ruling", Gurfein, Ct. J., concurring in Kaufman v. Edelstein, 539 F.2d 811, 823 (2d Cir. 1976). I have concluded that this is such a case.

"As to Which There is Substantial Ground for Difference of Opinion"

I conclude that this second element is present, primarily because, as noted above, this is a question of first impression. That is a factor stressed by the Schlagenhauf case, within the mandamus context, and cases which have followed it. That particular factor seems equally pertinent within the context of §1292(b).

Quite obviously, the fact that a district judge has carefully considered a question and arrived at a decision does not automatically bar his subsequent certification that there is "substantial ground for difference of opinion." Presumably district judges always do what they think is right; but they are bound to consider whether substantial grounds for "difference of opinion" exist, and, where the decision is one of first impression, so that the judge is sailing (or believes himself to be) as a first voyager through undiscovered and uncharted seas, he should be inclined to find that the second element is satisfied. It is quite a

different matter if the district court's order is just another implementation of an established line of authority.

"An Immediate Appeal from the Order May Materially Advance the Ultimate Termination of the Litigation"

While I am mindful of Judge Lumbard's observation, dissenting in American Express Warehousing, Ltd. v. Transamerica Insurance Co., supra, at 380 F.2d 285 n.2, that "an order granting or denying discovery could rarely, if ever, satisfy this requirement", I have concluded that an interlocutory appeal from the prior order may indeed "materially advance the ultimate termination of the litigation."

As noted above, I believe my prior order respecting discovery to be correct. I must recognize, however, that its implementation will subject the defendants to considerable additional discovery, into areas from which they have thus far rigidly excluded the plaintiff. Assuming arguendo that my original order was in error, then there is no reason why the defendants should be subjected to additional, time-consuming, and expensive discovery proceedings?

Furthermore, an appellate ruling, at this time, with respect to the central and significant issues posed by the prior order may well serve as instructive and time-saving guidelines at the trial of the case.

In short, I perceive in this case an appropriate opportunity for "an advance supervisory ruling" in Judge Gurfein's phrase in Kaufman v. Edelstein, supra.

The foregoing discussion is offered with deference, and in recognition that, despite my own conclusions, the Court of Appeals may determine that the appeal should not be permitted. I have attempted to set forth my reasons at some length for whatever assistance they may prove to be.

ORDER

For the foregoing reasons, it is hereby:

ORDERED, that this Court's prior Memorandum and Order of January 4, 1977 be, and the same hereby is, amended so as to provide that, in the opinion of this Court, such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

It is So Ordered.

Dated: New York, New York
February 22, 1977

CHARLES S. HAIGHT, JR.
U. S. D. J.

Footnotes

1. "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: Provided, however, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

2. Plaintiff also opposes certification on the ground that, far from advancing the litigation, an interlocutory appeal will delay completion of his discovery. Assuming that the Court of Appeals either denies certification, or grants it and affirms this Court's order, it is of course true that plaintiff's discovery proceedings will have been delayed. I see no reason, however, why plaintiff cannot go forward at this time with uncompleted discovery not related to these issues; or why defendants cannot commence their discovery of plaintiff. I gather from the papers submitted to me that the parties agreed to defer discovery of plaintiff until plaintiff had completed his oral discovery of defendants. Whatever considerations underlay that agreement when made, no reason appears why, in the present circumstances, the oral discovery of plaintiff cannot now begin.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

- x

ANTHONY HERBERT, :

Plaintiff-Appellee, :

-against- :

BARRY LANDO, et al., :

Defendants, :

BARRY LANDO, MIKE WALLACE and CBS INC., :

Defendant-Appellants. :

- x

AFFIDAVIT OF SERVICE

Index No. 77-7142

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

PETER K. DEMMERLE, being duly sworn, deposes and says:

1. I am over the age of 18 years and not a party to this action.

2. On the 2nd day of May, 1977, I served the annexed Brief and Joint Appendix upon:

Cohn, Glickstein, Lurie,
Ostrim & Lubell
1370 Avenue of the Americas
New York, New York 10019

by personally delivering and leaving two true and correct copies of the Brief and one copy of the Appendix at the offices of the above-mentioned attorneys.

Peter K. Demmerle
Peter K. Demmerle

Sworn to before me this
2nd day of May, 1977

Robert R. Cawthra, Jr.
Notary Public

ROBERT R. CAWTHRA, JR.
Notary Public, State of New York
No. 31-0605710
Qualified in New York County
Commission Expires March 30, 1978